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IN THE

Supreme Court of the United States

October Term, 1963

NO. 424

OKLAHOMA [illegible] COMPANY, INC.,

Appellant,

vs.

GULF COAST [illegible] MILLS, Appellee.

[illegible]

[illegible]

[illegible]

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IN THE

Supreme Court of the United States

October Term, 1963

NO._____

ORKIN EXTERMINATING COMPANY, INC.,
Appellant

v.

GULF COAST RICE MILLS, *Appellee*

JURISDICTIONAL STATEMENT UPON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

Appellant Orkin Exterminating Company submits herewith its statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Court of Civil Appeals for the First Supreme Judicial District of Texas, entered in the above-entitled cause Number 13,998 in such Court on November 8, 1962.

OPINIONS BELOW

The opinion of the Court of Civil Appeals herein sought to be reviewed is reported in 362 S.W. 2d 159, and is appended hereto as Appendix "A". An earlier opinion, upon the first appeal of this case to the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas, was reported in 343 S.W. 2d 768 and is appended hereto as Appendix "B". The appeal from the earlier decision was dismissed by the Texas Supreme Court (upon jurisdictional procedure issues not relevant here) in 347 S.W. 2d 250.

JURISDICTION

I. The proceeding below was an ordinary damage suit based on negligence and breaches of contract and of warranties, and therefore it was not brought *pursuant* to any particular statute but only pursuant to the common law. The various statutes *involved* therein, by virtue of appellee's pleadings and laws judicially noticed, are quoted in Appendix "C" and in subparagraph 5 below.

The specific ruling which raised the questions here on appeal was the ruling of the Houston Court of Civil Appeals substantially to this effect: *That the use of the pesticide "Lindane", in the processing of food in Texas, is prohibited as being in violation of both federal and local food statutes, notwithstanding federal regulations which sanction the use of such pesticide in food in certain quantities.*

2. The judgment sought to be reviewed herein was rendered and entered by the (Houston) Court of Civil Appeals for the First Supreme Judicial District of Texas on November 8, 1962. A Motion for Rehearing was overruled by that Court on November 29, 1962. Application

for Writ of Error to the Supreme Court of Texas was refused by the Supreme Court of Texas on March 6, 1963. A Motion for Rehearing was overruled by the Supreme Court of Texas on April 10, 1963. Notice of Appeal to this Court was filed by Appellant in the said Court of Civil Appeals on July 1, 1963.

3. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (2). Appellants challenge the validity of Texas statutes and City of Houston ordinances, as construed by the Texas appellate court, on the ground that such statutes and ordinances as so construed are repugnant to the Constitution and statutes of the United States, and the decision of the highest court of the state was in favor of their validity.

Review is also being sought herein by Certiorari, and this Court is respectfully asked to consider this appeal in conjunction with the Petition for Writ of Certiorari bearing the same caption as this statement.

4. Cases believed to sustain the jurisdiction of this Court on appeal include the following:

(a) The questions were timely raised after unanticipated appellate court rulings: *Herndon v. Georgia*, 55 S.Ct. 794, 295 U.S. 441, 79 L.Ed... 1530; *Saunders v. Shaw*, 244 U.S. 317, 320, 61 L.Ed. 1163, 1165, 37 S.Ct. 638; *Missouri ex rel. Missouri Insurance Company v. Gehner*, 281 U.S. 313, 320, 74 L.Ed. 870, 875, 50 S.Ct. 326; *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U.S. 673, 677, 678, 74 L.Ed. 1107, 1111, 1112, 50 S.Ct. 451.

(b) An asserted conflict between state law and federal regulations presents questions reviewable by this court on

appeal from state courts: *Metlakatla Indian Community v. Egan*, 80 S.Ct. 1321, 363 U.S. 555, 4 L.Ed. 1397.

(c) An appeal is properly taken from intermediate appellate court where its judgment upheld validity of state statute and Texas Supreme Court refused writ of error: *Michigan-Wisconsin Pipe Line Co.. v. Calvert*, 74 S.Ct. 396, 347 U.S. 157, 98 L.Ed. 583.

(d) All questions having the same substantial core as those specifically preserved below may be considered by this Court: *Boynton v. Virginia*, 364 U.S. 454, 5 L.Ed.2d 206, 81 S.Ct.. 182.

5. Lengthy statutes involved herein are quoted in Appendix "C"; their citations are: Penal Code of the State of Texas, Chapter 2, Title 12 (Vernon's Annotated Statutes, 2 Penal Code 37-38) Article 707; Civil Statutes of the State of Texas (12A, Vernon's Annotated Civil Statutes 325) Article 4472; Ordinances of City of Houston (City Code of Houston, Texas, 1942, page 454) Section 868.

The principal statutes involved are the following sections of the Code of Federal Regulations (1955) Title 21:

> Section 3.41. "(a) The amendment in clause (2) of Section 402 (a) of the Federal Food, Drug and Cosmetic Act shall become effective on the dates specified for the following pesticide chemicals:
>
> * * (2) Effective date October 31, 1955: * * * Lindane: . . . Grain (from treating storage bins)."
>
> Section 120.101 "* * * (a) (1) This section designates the poisonous or deleterious substances that, for the purposes of section 406 of the Federal Food, Drug and Cosmetic Act, are found to be *required* in the production of the fresh fruits or vegetables named in

paragraph (e) of this section. * * * (c) * * * (2) For the purposes of this section, where a tolerance of 5 parts per million for benzene hexachloride is set, it shall be deemed applicable to commercial benzene hexachloride, which is a mixture of several isomers. If the gamma isomer, known as Lindane, is used exclusively of other isomers, the tolerance shall be 10 parts per million." (emphasis added)

Section 120.1 "* * * (f) Where raw agricultural commodities bearing residues that have been exempted from the requirement of a tolerance, or which are within a tolerance permitted under section 408 are used, the processed foods will not be considered unsafe within the meaning of section 406 if (1) The poisonous or deleterious pesticide residues have been removed to the extent possible in good manufacturing practice; and (2) The concentration of the pesticide in the preserved or processed food when ready to eat is not greater than the tolerance permitted on the raw agricultural commodity."

QUESTIONS PRESENTED

I. Are the Due Process and Equal Protection clauses of the Fourteenth Amendment, and the Supremacy Clause (Art. 6) of the Constitution of the United States violated by state and city "pure food laws" which provide, as construed by the Texas Court of Civil Appeals, that food may be condemned upon the basis of a jury finding that "any" amount of a pesticide chemical may render such food injurious to health, in view of the conflict between such laws and Federal regulations which provide that such food containing 10 parts per million of such pesticide chemical shall not be considered injurious to health under the Federal Food, Drug and Cosmetic Act?

2. Does the Texas Court of Civil Appeals' judgment, holding that the use of a pesticide chemical in "any" amount in processed food is prohibited in Texas by federal and local law, violate the Immunities, Due Process and Equal

Protection clauses of the Fourteenth Amendment to the Constitution of the United States by denying to food processors the right to rely upon federal regulations which sanction the presence of such chemical in such food?

STATEMENT OF THE CASE

I. *Procedural History of the Case*

Respondent sued petitioner, in an ordinary damage suit upon theories of negligence and breach of contract, for damages incurred by respondent in obeying compliance orders issued by Federal and State food inspectors and city health inspectors. Respondent claimed that petitioner was legally liable for the consequences of such violations. After one jury trial and an appeal therefrom in which this suit was remanded for retrial, a second jury trial resulted in a District Court judgment for respondent upon a jury verdict finding petitioner negligent.

This District Court judgment was affirmed by the Texas Court of Civil Appeals in the opinion herein presented for review. Petitioner's motion for rehearing in such Court was overruled, and petitioner duly filed its application for a writ of error to the Supreme Court of Texas, which was refused by the Supreme Court, endorsed "Refused"—no reversible error" on March 6, 1963. Petitioner's motion for rehearing was overruled by the Supreme Court of Texas on April 10, 1963, after which action this petitioner had no further remedy for appellate review in the State courts of Texas.

II. Facts Material to the Questions Presented

(Parenthetical references, "S.F.", are to trial court's STATEMENT OF FACTS in the record presented with this statement.)

The incident from which this suit arose occurred on August 24, 1955, at the Gulf Coast Rice Mill, when a Federal Food and Drug Administration inspector found that respondent's milled rice contained traces of a pesticide chemical, Lindane, which he believed to be prohibited for use upon such rice by the Federal Food and Drug Act (S.F. 48, 64, 75, 132, 401-402). The federal inspector declared the rice contaminated and adulterated (S.F. 402). The opinion of the Texas Court of Civil Appeals, presented herein for review, correctly states the facts in this connection: 362 Southwest 2d at Page 162. The quantity of Lindane found in the rice ranged from *zero* (S.F. 284-285, 290) to 3.6 parts per million parts of rice (S.F. 286-288). The inspector threatened to seize the rice if it were shipped (S.F. 75).

The Federal Food and Drug Administration had been given authority to establish "tolerances", regulating amounts of pesticides used in foods, in 1938 by Section 346 of the Federal Food and Drug Act; however, this power was not exercised and Section 346 remained in disuse. In 1954, the Pesticide Amendment to the 1938 Federal Food, Drug and Cosmetic Act was passed, authorizing the Administration to establish tolerances for the use of pesticide chemicals upon "raw" agricultural commodities (Clause (a) (2) (B) of Section 342, Title 21 U.S.C.A.). The Administration began fixing such tolerances in 1955, but had not set any tolerance for the use of Lindane upon rice (or any other "grain" in its raw state) as of the time of the inspection and compliance orders given by the Federal inspector on August 24, 1955.

Local state and city inspectors also advised respondent that its rice was adulterated under the law, and would

have to be cleaned by remilling in order to be brought into compliance with state statutes and city ordinances (S.F. 74-75); the facts in this respect are correctly stated by the Texas court below. The respondent acceded to the orders of all officials and incurred damages in the sum (not disputed by petitioner) of over $36,000 (not including interest) in bringing its rice into compliance with the food statutes of the federal, state and city governments (S.F. 61-62). Respondent thereafter, nearly two *years after such incident* (I Transcript 2), filed this suit against petitioner to recover the money expended in obeying such compliance orders, alleging that it had necessarily obeyed such inspectors' orders under such threats of prosecution (I Transcript 2-11).

Respondent's allegations in its suit set forth a negligence action in the usual form and also actions for breach of warranty and breach of contract, which alleged not only breaches based upon the use of the Lindane, but also based upon faulty methods of insect control allegedly causing the same damage (I Transcript 4-11). Pleading in reply thereto, petitioner alleged a general denial and only such affirmative defenses, i.e., statute of limitations, laches, estoppel, waiver, and contributory negligence as was required by Texas Rules of Pleading (I Transcript 13-19).

In a jury trial, respondent introduced evidence of faulty insect control (S.F. 65-66) as well as of the government inspectors' administrative findings of adulteration by the "prohibited" pesticide chemical (S.F. 75). While no evidence of any other administrative finding by the federal inspector was adduced, there was testimony offered by the Director of the Division of Food and Drugs, Department of Health for the State of Texas, that his Department

was prepared to take action against respondent on account of the presence of the Lindane (S.F. 278) and that in his scientific opinion, *any* amount of Lindane in such rice "might render it injurious to health", no matter what the amount [S.F. 298-299]. Medical witnesses also testified that trace amounts, as little as .06 parts per million, might have rendered the rice "injurious to health" (S.F. 305-310, 311-315).

The jury verdict was upon special issues finding that the Lindane "may have rendered the rice injurious to health", that the application of it by petitioner was negligence, and that such application was a proximate cause of the damages claimed (I Transcript 55-56). The jury verdict is quoted in the judgment rendered thereon, and such Trial Court judgment is appended hereto as APPENDIX "D". Judgment was entered on the verdict alone, and *without any legal conclusions or findings of law* (I Transcript 54-59).

Petitioner asserted the only grounds appropriate under Texas law as grounds for its motion for judgment non obstante veredicto, to-wit: that there was "no evidence" to support the verdict and that all pleadings and evidence showed that no cause of action had been made out. (I Transcript 45-50).

There being no findings made against petitioner with respect to its having been guilty of violations of any food or health statutes or other law, petitioner appealed from such judgment by relying upon its motion for a judgment N.O.V. upon the theory that no cause of action had been made out in tort or contract (BRIEF FOR APPELLANT ORKIN EXTERMINATING COMPANY, pages 1 and 44).

The Court of Civil Appeals (Houston) affirmed.

The judgment of the Court of Civil Appeals complained of herein was based upon two specific legal conclusions:

1. "Since no tolerance for Lindane on milled rice as applicable to the facts of this case had been established by the Secretary of Health, Education and Welfare, the addition of any amount of Lindane to such milled rice was in violation of Section 342 (a) (2) of the Federal Food, Drug and Cosmetic Act, and especially so if it may have rendered the rice injurious to health." (Opinion, at 362 S.W. 2d 164, paragraph (1, 2)).
2. "* * * There is substantial evidence showing that Lindane in any quantity on rice may render such article injurious to health." (Opinion, at 362 S.W. 2d 163, last paragraph).

Further, that Court held generally that *all local* laws, as pleaded, had been violated.

These legal findings of law violations, the first such findings made by any person or agency since those made on August 24, 1955, against Respondent, were contested by Petitioner in its Motion for Rehearing in the Court of Civil Appeals (Houston) upon the following grounds (a certified copy of original MOTION FOR REHEARING is contained in the record filed herewith):

(1) The holding that "there is substantial evidence showing that Lindane in *any* quantity on rice may render such article injurious to health" violates the Constitution of the United States in that it conflicts with the Federal Food, Drug and Cosmetic Act and regulations promulgated thereunder. (paragraph 1 of such Motion).

(2) The holding that the evidence supported a finding that .02 to 3.6 parts per million of Lindane may have rendered the rice injurious to health, violated the Constitution of the United States in that it conflicts with the Federal Food, Drug and Cosmetic Act (paragraph 2 of such Motion).

(3) The holding that no tolerance had been established for Lindane, and that therefore any quantity of Lindane was prohibited as being possibly injurious to health, conflicts with the Federal Food, Drug and Cosmetic Act, and thus violates the Constitution of the United States (paragraph 3 of such Motion).

(4) The holding that a jury fact question was raised, by evidence of Lindane in the rice in amounts ranging from *none* to 3.6 parts per million, conflicts with the Federal Food, Drug and Cosmetic Act and therefore violates the Constitution of the United States (paragraph 4 of such Motion).

(5) The holding that state and city laws were violated by application of Lindane in such amounts was in conflict with the Federal Food, Drug and Cosmetic Act, and therefore violated the Constitution of the United States; further, such holding conflicts with federal statutes which have pre-empted regulation of such matters, and such holding violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that it is arbitrary, unreasonable and discriminatory (paragraphs 5, 6 and 7 of such Motion).

(6) There is no evidence to support any cause of action and a verdict should have been directed and judgment rendered for Defendant (Petitioner) (paragraphs 8-11 of such Motion).

Petitioner's Application for Writ of Error to the Texas Supreme Court asserted the constitutional questions as follows:

POINT 1: The Court of Civil Appeals erred in holding that Section 346 of the federal food laws was applicable herein, and that since no tolerance for Lindane had been established thereunder, the rice was adulterated under Section 342(a)(2) of the federal law.

POINT 2: Such Court erred in construing Section 346 of the federal food laws as applicable herein, when such statute so construed is unconstitutional as being an invalid delegation of legislative power to the judiciary under the United States Constitution and the Court's construction constitutes a usurpation of legislative power.

POINT 3: Such Court erred in construing Section 346 of the federal food laws as applicable herein, when such statute so construed is unconstitutional as being a denial of due process of law under the United States Constitution.

POINT 4: Such Court erred in holding that "any" amount of Lindane on milled rice may render such rice adulterated under either federal, state or city food laws, because such holding is a judicial act in conflict with federal law in an area preempted by the federal government and is therefore in violation of the Federal Constitution.

POINT 5: The Court of Civil Appeals erred in holding that there was substantial evidence supporting the jury's finding that Lindane in "any" quantity on rice may render it injurious to health and thereby adulterated under Section 342(a)(1), where there was no evidence to support such holding.

POINT 6: Such Court erred in construing Section 342 (a) (1) as being violated by the presence of "any" amount of Lindane to the rice, because such statute so construed is unconstitutional as being an invalid delegation of legislative power to the judiciary under the United States Constitution and the Court's construction constitutes a usurpation of legislative power.

POINT 7: Such Court erred in holding that there is substantial evidence showing that Lindane in "any" quantity on rice may render it injurious to health, because such adjudication is an unconstitutional denial of due process by such State tribunal in violation of the Fourteenth Amendment of the United States Constitution.

POINT 8: Such Court erred in construing the state statute and city health ordinance as rendering the rice adulterated by the presence of "any" quantity of Lindane, because such statute and ordinance so construed are unconstitutional as being in conflict with the Federal Food, Drug and Cosmetic Act and regulations promulgated thereunder, in violation of the United States Constitution.

POINT 9: Such Court erred in construing the state statute and city ordinance as rendering the rice adulterated by the presence of "any" quantity of Lindane thereon, because such statute and ordinance so construed are unconstitutional in that they deny due process of law in violation of the United States Constitution.

POINT 10: Such Court erred in construing the state statute and city ordinance as rendering the rice adulterated by the presence of "any" quantity of Lindane thereon, because such statute and ordinance so construed are unconstitutional in that they deny Equal Protection of law in violation of the United States Constitution.

III. *Federal Question Was Raised Timely Below in Appellate Court:*

Petitioner relies upon the exception to the general rule that the Federal question must be raised in the trial court to be timely, in that the federal questions raised in this case were *presented* for the first time by the rulings of the Texas Court of Civil Appeals, as stated in *Herndon v. Georgia*, 55 S. Ct. 794, 295 U.S. 441, 79 L. Ed 1530, rehearing denied 56 S. Ct. 82, 296 U.S. 661, 80 L. Ed. 471, by Mr. Justice Sutherland:

> "Petitioner, however, contends that the present case falls within an exception to the rule—namely, that the question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the Constitution. There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it."

Mr. Justice Cardozo carefully analyzed this exception to the general rule in his dissent in the *Herndon* Case, and phrased the rule in this language:

> "The settled doctrine is that when a constitutional privilege or immunity *has been denied for the first time* by a ruling made upon appeal, a litigant thus surprised may challenge the unexpected ruling by a motion for rehearing, and the challenge will be timely". (Emphasis added)

While the *Herndon* decision held that the federal question was not raised timely under the facts therein, that decision was based upon the undisputed circumstance that

the Georgia statute therein questioned had previously been construed, shortly before petitioner's opportunity for challenging it in the trial court, by the Supreme Court of the State of Georgia in another lawsuit. But the majority opinion by Mr. Justice Sutherland noted the fact that in the appeal to the State Supreme Court in the other lawsuit "the court in substance construed the statute as it did in the present case", and therefore the petitioner in the *Herndon* case should have anticipated what the state appellate court would do in his suit.

In the case at bar, the facts were exactly the opposite. After the first trial of this case, the judgment for respondent was reversed upon this first appeal herein, and this reversal by the other Texas Court of Civil Appeals, sitting at Waco, Texas, was based upon a construction of these federal statutes herein involved contrary to the construction placed upon them by the Houston Court of Civil Appeals in the second appeal. While there were differences in the evidence in the second trial, the statutes and alleged violations were the same; as the Houston Court said at the outset of its opinion at page 161 in 362 S.W. 2d, the respondent's pleadings "were identical on both trials". Thus this Petitioner was faced with the same claims as to which statutes had been violated, and the manner in which they had been violated. The Waco Court's opinion (Appendix "B") was quoted by the Houston Court's opinion as having been based upon the same essential fact with respect to whether the Lindane could have rendered the rice injurious to health, namely the fact that such rice had contained quantities of Lindane ranging "from *none* up to 3.6 parts per million parts of rice", and the Waco Court held "that such amounts are not injurious to health, in any manner".

The extraordinary nature of the litigation at bar is such that there was never any legal ruling or order issued by any government official to which this Petitioner could possibly have objected, until such rulings and orders were made in the opinion of the Houston Court of Civil Appeals. The original administrative rulings made by the food inspectors in 1955 were not even directed to this Petitioner. The charges leveled against petitioner by the respondent in its lawsuit were only the widely assorted allegations of various breaches of civil duties that are customary in "shotgun pleadings" designed to cover every possible cause of action that respondent might be able to prove by the evidence. Petitioner complied with Rule 94, Texas Rules of Civil Procedure, in specially pleading every affirmative defense required under such Rule. Petitioner was not required to anticipate the construction to be placed by the Court upon each one of the statutes alleged in respondent's pleading, and to plead that it *would* be unconstitutional *if* so construed. The basic federal statute involved, Section 342 of the Federal Food, Drug and Cosmetic Act, had been held constitutional *as written*, and Petitioner herein only claims now that it is unconstitutional *as construed* by the Houston Court of Civil Appeals. Petitioner "was not bound to contemplate a decision of the case" before the verdict was reached, nor to anticipate how the Courts would construe the statutes alleged. *Saunders v. Shaw*, 244 U.S. 317, 320, 61 L. Ed. 1163, 1165, 37 S. Ct. 638.

Petitioner could not even anticipate *whether* the Court would construe many of the statutes alleged in respondent's pleading. For example, two statutes were alleged inconsistently as having been violated; a finding of a violation of Section 346a, 21 U.S.C.A., would have to be

based upon a finding that the milled rice was a "raw" agricultural commodity. Respondent had alleged that the rice was subject to such Section, and even, in the second trial, offered an inspector's testimony that milled rice was a "raw" commodity (S.F. 298-299). At the same time, a violation of Section 346 of that Act was also alleged, and the respondent thus sought a ruling that the rice was a "processed food" in spite of its own proof to the contrary. Petitioner could not reasonably be expected to speculate as to every possible construction of every one of the dozens of inconsistent statutes alleged in the hope of guessing the one ultimately to be applied by the Courts.

ARGUMENT

I. Summary of Argument

Two rulings form the basis for judgment below. They are combined in this single statement by the Houston Court of Civil Appeals:

> "Since no tolerance for Lindane on milled rice as applicable to the facts of this case had been established by the Secretary * * *, the addition of any amount of Lindane to such milled rice was in violation of §342(a) (2) * * *, and especially so if it may have rendered the rice injurious to health."

The first holding is based upon the absence of a tolerance under Section 346 (although possibly the Court referred also, in this particular passage, to Section 346a—this will not seriously affect the ultimate issues).

The second holding is based upon the possibility of injury to health, and applies equally to the state and city laws as well as federal statutes. This ruling is the particular basis

for the repeated conclusions by the Texas Court that the rice was adulterated and subject to condemnation under state and city, as well as federal, food statutes. To this second holding we answer: Federal regulations sanction the presence of up to 10 parts per million of Lindane on many foods, including rice after it has been processed and "when ready to eat," and this sanction precludes any state or city agency, whether legislative, judicial or administrative, from establishing or enforcing a more strict regulation of either pesticides or foods.

II. The application of the state and city laws, as construed by the Court below, prohibiting the presence of "any" amount of Lindane in processed food, violates the Due Process and Equal Protection Clauses of the 14th Amendment and the Supremacy Clause of the federal Constitution.

If the food and pesticide industries follow federal sanctions, the entire public of the United States may ingest Lindane directly with its everyday food in ready-to-eat form with at least 42 daily foods such as common fruits and lettuce. See C.C.H. Food, Drug, Cosmetic Reporter, Vol. 1, pages 1781-1830, and the 42 tolerances listed in Federal Register for March 11, 1955.

Lindane is one of the common-place economic poisons, the Gamma Isomer of Benzene Hexachloride, which means it is the "pure" B.H.C. and is given a tolerance of *10 p.p.m.* in all instances where "commercial B.H.C." is given a tolerance of 5 p.p.m. (21 C.F.R. 120.101(b) and (c) (2)). Lindane has a tolerance of 10 p.p.m. on "Grain (from treating storage bins)" under Section 341, Title 21 C.F.R. (1955). This was established on October 31, 1955.

and meant that *unmilled* rice was allowed to have that tolerance, since it is a *grain*.

It is true that all of these tolerances were promulgated under the "raw agricultural commodity" provisions, §346a, and that such section does not apply to milled rice in the sense that prosecutions can be brought under such section. But the logic or rationale of the Court of Civil Appeals' ruling that 346a is not applicable in that respect, and that for this reason "no tolerance had been established" for milled rice *under* such section, supplies no reason for ignoring the *fact* that such section provides the sanction for the *reality* that Lindane may be eaten with food every day. The regulation explaining the practical application of §346a states this in express terms:

> "Where raw agricultural commodities bearing residues * * * which are within a tolerance permitted under §408 (meaning 346a of 21 U.S.C.) are used, the *processed* foods will *not* be considered *unsafe* within the meaning of 406 (meaning 342(a)(2) if * * * the poisonous or deleterious pesticide residues have been removed to the extent possible in good manufacturing practice and (2) the concentration of the pesticide in the preserved or processed food when *ready to eat* is not greater than the tolerance permitted on the raw agricultural commodity." (21 C.F.R. 120.1 (f) (Emphasis added)

Thus, any unmilled rice containing Lindane will be deemed safe if it contains 10 p.p.m. after milling. The federal administrative agencies actually recommended the use of Lindane in raw food in these amounts. The reason for the use of pesticides is to rid food of filth and infestation and the massive effort of the Federal Food and Drug Administration includes affirmative steps in providing this

sanitation. The only scientific means of ensuring such sanitation in food is to encourage the use of these poisons. Thus, so long as Lindane is used in such amounts that leave only permissible residues in the processed food, it is used not only by sanction but in furtherance of the public policy which is evidenced by this administrative effort.

Apparently the Court of Civil Appeals did not reject these factual aspects of the "raw" commodity amendment merely because the tolerance for grain had not been established prior to the date of the threatened prosecution (which, in effect, constituted the damage complained of by Respondent). The Court noted that such amendment, §346a, "was in full force and effect in August, 1955". Further, the Court *actually did apply* that section to this case when it held that *"Since plaintiff's* grain had been milled and was *not* a raw agricultural commodity, no tolerance had been established for it". The time of the establishing of such individual tolerance could have no bearing upon *whether* the ingestion of "any" amount of Lindane was *in fact harmful.* In any event, the tolerance (21 C.F.R. 3.41) that was established for Lindane on "grain" (which includes unmilled rice) was effective on October 31, 1955, when Respondent was just getting started in remilling its grain (S.F. 118). So it is indisputable as a matter of law that the very rice the Respondent was remilling on October 31 (see S.F. 118, 84-117) could have contained 10 p.p.m. of Lindane "when ready to eat" and it would have been considered "safe" by the Federal Food and Drug Administration.

The Court below made no mention of section 120.1 (f) which permits Lindane to be present in milled rice "when ready to eat". But this regulation constitutes a part of the

statutory law of the United States which cannot be ignored; it must be judicially noticed and respected. Since the federal government has pre-empted the field of government regulation of food sanitation, at least in that portion of such field wherein fixed tolerances are the method of regulation, its regulations are the supreme law of the land. This judgment of the Court of Civil Appeals and the statutes enforced by it are in direct and positive conflict with such regulations and are therefore unconstitutional. *Oregon-Washington R. & N. Co. v. Washington,* 270 U.S. 87, 70 L. Ed. 482, 46 S. Ct. 279; *Cloverleaf Butter Co. v. Patterson,* 315 U.S. 148, 86 L.Ed. 754, 62 S. Ct. 491.

Finally, the local laws as so construed by the Court below violates the due process clause of the federal constitution because they unreasonably and arbitrarily discriminate against manufacturers and users of Benzene Hexachloride in particular, and pesticides in general, by prohibiting their use without any classification or distinction upon bases of degrees having any rational basis. The effect of such construction is that the jury has been allowed to find a "fact" which is contrary to laws of nature, to public policy and to the federal law, and to all concepts of what is "substantial evidence" under the federal law.

III. These Federal Questions Are Substantial.

The presumption that public officials will properly and faithfully perform their legal duties is an elementary legal presumption of compelling seriousness in this case. The Texas court has, by its use of absolute terms, declared a broad prohibition against the presence of *any* Lindane in processed food. Lindane is absolutely contraband in food processing. It must be presumed that all food inspectors will enforce the local and federal laws in Texas in accord-

ance with this construction pronounced by this Texas Court. Accordingly, it is now the duty of every attorney in Texas, whose clients possess processed food containing a residual of Lindane, to advise them that they are guilty of violating these food laws and that they must clean or destroy such food—notwithstanding the fact that such food dealers may have used such pesticide in reliance upon Sections 120.101(c)(2) and 120.1(f) of the federal regulations.

The area of law governing chemicals in food is in need of clarification, and this case provides the appropriate occasion for meeting this need which it demonstrates. The questions here presented therefore require plenary consideration.

Petitioner requests that this statement, if not properly before this Court on appeal, be considered as an application for certiorari, and be considered in conjunction with related questions presented in the Application for Writ of Certiorari heretofore filed, drawing into issue the constitutionality of sections of the Federal Food, Drug and Cosmetic Act.

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Attorneys for Orkin Exterminating Company, Inc., Appellant

By:_____
John D. Richardson

Proof of Service

I, John D. Richardson, one of the attorneys for Orkin Exterminating Company, Inc., Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of August, 1963, I served copies of the foregoing jurisdictional statement upon the following:

1. On Gulf Coast Rice Mills, Appellee, by depositing same in a United States mail box with first class postage prepaid, addressed to Carnes & Martin, counsel of record for such Appellee, at their last known post office address at Bank of the Southwest Building, Houston, Texas.

2. Upon the Solicitor General, Department of Justice, Washington, D. C., by depositing same in a United States mail box with air mail postage prepaid, addressed to him at his post office address at Department of Justice, Washington 25, D. C.

John D. Richardson

APPENDIX "A"

ORKIN EXTERMINATING COMPANY, INC.,
Appellee,
v.
GULF COAST RICE MILLS, *Appellee.*

NO. 13998

Appeal from District Court of Harris County

This suit was brought by plaintiff, Gulf Coast Rice Mills, against Orkin Exterminating Company to recover damages allegedly growing out of breach of contract and negligence of the defendant. Both plaintiff and defendant have perfected appeals to this Court from the judgment rendered by the trial court on the second trial of the case. From the judgment of the District Court rendered on the first trial an appeal was taken by the defendant and the judgment was reversed and the cause remanded by the Waco Court of Civil Appeals. Orkin Exterminating Company, Inc. v. Gulf Coast Rice Mills, 343 S.W. 2d 768, dism. w.o.j.

A summary of plaintiff's pleadings, which were identical on both trials, is given in the opinion of the Waco Court. We quote from such summary as follows:

> "Plaintiff alleged that it entered into a written contract with Orkin in 1952 under the terms of which Orkin was to exterminate and control insects, rodents, and pests in plaintiff's mill; that in August, 1955,

> Orkin sprayed plaintiff's mill with an insecticide or pesticide known as Lindane; that Lindane is poisonous and prohibited by law to be so used; that the application of Lindane to the mill rendered the rice unusable; that the use of Lindane on the interior of the mill was negligence; caused the rice to be unfit for use and adulterated; caused the Federal authorities to prohibit sale of the rice; caused the rice to be injurious to health and unsafe within the meaning of the Federal Food and Drug Act. 21 U.S.C.A. §301 et seq.; that the foregoing were proximate causes of damages suffered by plaintiff which were alleged to be some $96,000 (expense for remilling the rice and loss of profits incurred while so remilling the rice.)"

The plaintiff also alleged violations of certain provisions of the laws of the State of Texas and ordinances of the City of Houston, and pled that Orkin had defaulted and breached its contract in some 17 particulars. These breaches are summarized in the opinion of the Waco Court of Civil Appeals. That Court on the record before it held that the trial court erred in granting the partially instructed verdict for the plaintiff, thereby withdrawing from the jury any issues as to whether defendant breached its contract, or defaulted upon its express or implied warranty, since there were numerous disputed fact issues in the contract and breach of warranty phases of the contract. With respect to the tort phase of the case, the Court held that the record did not support any recovery.

On the second trial, the court overruled plaintiff's and defendant's motions for an instructed verdict, and submitted the case on seven special issues to which the jury found in substance: (1) that the application of Lindane in August, 1955, to the rice and premises of plaintiff was

a proximate cause of damages sustained by plaintiff; (2) that such application to the rice may have rendered it injurious to health; (3) that such application was a proximate cause of plaintiff's damages, and (4) was negligence; (5) that such negligence was a proximate cause of plaintiff's damages; (6) that $27,790.07 was the sum of money that would fairly and reasonably compensate plaintiff for such damages as were caused by application of Lindane to the rice and premises of plaintiff, taking into account (a) cost of remilling the rice, (b) cost of cleaning plaintiff's premises and (c) difference between reasonable market value of rice before and after remilling, directly resulting from the application of Lindane in August, 1955; and (7) that $15,000.00 would fairly and reasonably compensate plaintiff for such damages as were directly and proximately caused by loss of use of plaintiff's mill reasonably and necessarily consumed in remilling the milled rice.

The trial court on hearing defendant's motion for judgment non obstante veredicto, reduced the jury's finding of $27,790.07 in answer to Special Issue (6) to $21,245.32 because plaintiff's pleading limited such items of damages to that amount, and otherwise overruled such motion and entered judgment for plaintiff in the total sum of $36,246.32, being the reduced amount of the verdict plus $1.00 nominal damages for breach of contract insurance provisions.

Orkin contends that the trial court erred in overruling its motion for an instructed verdict and judgment non obstante veredicto when there was no evidence to support any cause of action or legal theory of recovery, and the law of the case and the evidence showed that the record

did not support recovery on the tort phase of the case. Orkin states that the statement of the nature of the case on pages 768-772 of the opinion of the Waco Court is correct and it adopts the same. It asserts that the pleadings and evidence were the same in both trials, except for defendant's additional allegation as to the law of the case made in its third amended original answer filed subsequent to the opinion handed down by the Waco Court. The Waco Court's summary of the evidence adduced on the first trial is as follows:

> "The record reflects that plaintiff Rice Mills entered into a written contract with defendant Orkin Exterminating Company in 1952, under which Orkin was to exterminate insects and rodents in plaintiff's mill; that the insect and rodent situation became so bad that in August, 1955 Orkin sprayed with an insecticide known as Lindane. Thereafter, the Federal Food and Drug Administration and the State Health Department and the City of Houston made some investigation of the use of Lindane at the Rice Mill. All agencies finally in effect delegated to Inspector Moses of the Federal Food and Drug Administration the right to act for them. Inspector Moses told the Rice Mill that the use of Lindane had violated the law; that the Mill was in serious trouble; that the Mill could ship no rice; that such rice was unfit for human consumption; that the rice would be condemned; the buildings padlocked and the Mill and its offices subject to prosecution both civilly and criminally. Inspector Moses' (and the government's) position was that no amount of Lindane was permitted on rice; that no tolerance was established for it, and for that reason the rice was contaminated, and would have to be remilled. The plaintiff Rice Mill relied on what Inspector Moses told it (speaking for the Federal, State and City Health Departments), and

without contesting, disputing, or litigating, the validity or legality of the claims of Inspector Moses and/or the 3 Health Departments, plaintiff proceeded to remill the rice at an expense of some $46,245. and during such period lost profits which the jury found to be $40,000.

"As further pertinent, we note that the record reflects that some 95% of the plaintiff's rice was intended for export to a foreign country. The record further reflects that a great many samplings of the rice were tested for Lindane and that the result of such samplings ran from *none* up to 3.6 parts of Lindane per million parts of rice. It is further reflected that such amounts are not injurious to health, in any manner."

It is Orkin's contention that the facts in evidence pertaining to the negligence phase of the case are substantially the same as on the first trial, and that for such reason the specific findings of law made by the Waco Court are binding upon this Court as the law of the case. We think it unnecessary to set out such findings since they may be found on pages 771-2 of the Court's opinion. It is our view that there are some substantial differences between the evidence adduced at the first trial and at the second trial. Several medical witnesses testified on the first trial who did not testify on the second trial. The applicable ordinances of the City of Houston were not introduced on the first trial but were introduced on the second trial. On the second trial, there is no evidence that the City and State agencies delegated to Inspector Moses the right to act for them, although they may have agreed that Federal, State and City food laws had been violated. Other differences will appear in the course of this opinion.

Plaintiff asserts that the answers of the jury to the special issues submitted constitute findings against Orkin on both the contract and tort phases of the case. Plaintiff requested certain more specific issues with respect to breaches of contract by Orkin, which were refused by the trial court. Any error of the trial court in refusing such issues has not been preserved by plaintiff and cannot be considered by this Court. The special issues submitted are limited to the use and application of Lindane and do not encompass any damages resulting from infestation of the rice by insects or rodents.

The contract does not make specific mention of Lindane. It specifies the scope of work and controlled service to be rendered by Orkin, and with respect to material to be used provides: "The materials used shall conform to Federal, State and local ordinances and laws, and shall be acceptable to the rice milling industry." Plaintiff argues that Orkin in using Lindane violated the provisions of the contract and breached its implied warranty to use proper materials, and was guilty of violations of the Federal Food, Drug & Cosmetic Act, in that (1) it violated 21 U.S.C., Sec. 342(a)(2) since no amount of Lindane whatever was permitted on milled rice; and (2) it violated 21 U.S.C., Sec. 342(a)(1) in that it contained a poisonous and deleterious substance "which may render" the rice injurious to health. Plaintiff further contends that the undisputed evidence also shows violations of the Pure Food laws of the State of Texas and violations of the City of Houston ordinances.

Our inquiry is limited to alleged violations of the contract in the use and application of Lindane and to determining whether there is any evidence supporting the findings of the jury with respect thereto on either or both

the contract and tort phases of the case. We are unable to say as a matter of law that Orkin breached its contract and implied warranty with respect to the infestation of the rice. In this respect we are in accord with the law of the case as determined by the Waco Court. But even if we were to hold that there were such breaches as a matter of law, we would still be unable to determine how much damage resulted therefrom in the absence of a jury finding, and no issues were submitted with respect to such damage, although there was some evidence that the rice would probably have been remilled because of the infestation regardless of the use of Lindane.

Plaintiff pleaded that the spraying of an insecticide or pesticide on plaintiff's rice, rendering it unfit for sale, was a violation of Sections 861-880 of the Houston City Ordinances of 1942. Section 868 of such Ordinances provides that for the purpose of Article IV, entitled "Pure Food & Drugs," an article shall be deemed adulterated (c) Food . . . (5) "If it contains any added poisons or other added deleterious ingredient which may render such article injurious to health . . ." Section 866 provides: "No person shall, within the City, manufacture for sale, have in his possession with intent to sell or exchange, any article of food or drugs which is adulterated or misbranded within the meaning of this article." Section 873 provides for prosecution and punishment for violations of the foregoing sections.

The record in this case reflects that Lindane is a poisonous or deleterious ingredient and that it was added to the rice by Orkin in blowing Lindane dust all over the rice in plaintiff's mill. It was not necessary to show that the food containing an added poisonous or deleterious sub-

stance must affect the public health in order for it to be condemned. All that need be established is that the added poisonous or deleterious substance must be such as may render such article injurious to health. United States v. Lexington Mill & Elevator Co., 232 U.S. 399, 34 S. Ct. 337, 58 L. Ed. 658. There is substantial evidence showing that Lindane in any quantity on rice may render such article injurious to health. The jury's finding to Special Issue No. 2 finds support in the evidence. There is no assignment that any of the jury's findings are against the weight and preponderance of the evidence, and if there were such assignment, we could not consider it since defendant appeals from the court's refusal to grant an instructed verdict and judgment non obstante veredicto.

Plaintiff also pleaded that by spraying such rice and adulterating it and rendering it unfit for sale, Orkin violated Articles 4471 and 4472 of the Texas Revised Civil Statutes, and Articles 706, 707 and 717 of the Texas Penal Code. These provisions are substantially the same as those provided in the City of Houston ordinances. The violation of such statutes would subject plaintiff to criminal prosecution by the State, and to confiscation of the rice.

There is evidence in the record before us that Orkin applied Lindane to plaintiff's stores of rice, including both milled and unmilled rice. No claim for damages has been made by plaintiff for the unmilled rice, since it would necessarily have to be milled and milling would remove the Lindane.

The Waco Court on the record before it found in effect that there had been no violation of the Federal statutes relied upon by plaintiff. We think the record on this

appeal shows certain violations. Sec. 342 provides: "A food shall be deemed to be adulterated—(a)(1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health. . .; or (2) (A) if it bears or contains any added poisonous or added deleterious substance . . . which is unsafe within the meaning of section 364a . . ." The exceptions in Section 342(2)(A) do not apply to milled rice and are inapplicable to the facts of this case. Section 346 with respect to tolerances for poisonous ingredients provides: "Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for the purposes of the application of clause (2)(A) of section 342(a) of this title." The evidence and the record before us show that Lindane was not required in the production of rice and that its use could have been avoided. Indeed, Lindane had been used only once in connection with plaintiff's mill from 1940 to 1955, and then it was used without the knowledge of the plaintiff or the health authorities. From the time of the application in August, 1955 Lindane has not been used down to the date of the second trial in 1961. Moreover, no allowance or tolerance was established for the use of Lindane on milled rice.

Plaintiff asserts that on the second trial the evidence shows that Lindane was on all the samples of rice that were taken and analyzed, except one sample that had been remilled. Even if plaintiff is mistaken in such assertion, there is nevertheless evidence showing that a number of samples were taken and that the results of many samplings showed from 0.2 to 3.6 parts per million of Lindane, and

that the addition of such parts of Lindane to milled rice may render it injurious to health. Manifestly it would be impossible to segregate from the stores of contaminated milled rice in question some unknown quantity of rice that might not have had Lindane on it in such quantities.

Since no tolerance for Lindane on milled rice as applicable to the facts of this case had been established by the Secretary of Health, Education & Welfare, the addition of any amount of Lindane to such milled rice was in violation of Section 342(a)(2) of the Federal Food, Drug & Cosmetic Act, and especially so if it may have rendered the rice injurious to health. The Act in question is quite specific, as stated by the Supreme Court of the United States in the recent case of Flemming v. Florida Citrus Exchange, 358 U.S. 153, 79 S. Ct. 160:

> "Here again, in our construction of this explicit Act, we must be sensitive to what Congress had written, and recall that 'It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort.' 62 Cases of Jam v. United States, 340 U.S. 593, 596, 71 S. Ct. 515, 518, 95 L. Ed. 566."

Section 3.41, Title 21, 1955, Code of Federal Regulations, provides: "(a) The amendment in clause (2) of section 402 (a) of the Federal Food, Drug, and Cosmetic Act shall become effective on the dates specified for the following pesticide chemicals: . . . (2) Effective date October 31, 1955: . . . Lindane: . . . Grain (from treating storage bins)." On the second trial it was established that plaintiff had never had any treating storage bins. The 1954 amendment to Section 342(a)(2) as provided in Section 5 of the Act of July 22, 1954 as applicable to the facts of the case before us, became effective one year following

the date of the enactment of the Act or on July 22, 1955, and was in full force and effect in August, 1955, when the Lindane was applied to plaintiff's rice. Section 120.1 (e), Title 21, 1955, Code of Federal Regulations, entitled "Definitions, Interpretations, and Exemptions," provides in substance that the terms "Raw agricultural commodities" does not include foods that have been processed, fabricated, or manufactured by cooking, freezing, dehydrating, *or milling*. Since plaintiff's grain had been milled and was not a raw agricultural commodity, no tolerance had been established for it. Therefore, the application of any amount of Lindane was prohibited since it would add to the milled rice a poisonous or deleterious substance that may be injurious to health as shown by the evidence adduced on the second trial.

At the time of the occurrence in question, the Federal Food, Drug, and Cosmetic Act, Section 381(d), 21 U.S.C.A., provided with respect to exports that a food intended for export shall not be deemed to be adulterated or misbranded if it accords to the specifications of the foreign purchaser, is not in conflict with the laws of the country to which it is intended for export, and is labeled on the outside of the shipping package to show that it is intended for export. "But if such article is sold or offered for sale in domestic commerce, this subsection shall not exempt if from any of the provisions of this chapter." While there is some evidence that as much as 95% of plaintiff's rice had been exported during some prior years, the evidence does not show that the rice in question was labeled for export or that it would necessarily be exported. It was held subject to sale in domestic markets as well as foreign markets. Furthermore, the undis-

puted testimony of plaintiff's general manager Smith, who negotiated contracts with foreign buyers, was to the effect that he could not have sold to any foreign purchasers any rice containing Lindane.

Defendant contends, however, that plaintiff voluntarily remilled its rice, and that it was not forced to do so by the Federal, State or City authorities. We think this contention is without merit. Under the evidence adduced on the second trial, it appeared that plaintiff was placed in such position by Orkin that it could not keep the rice in its possession, sell or exchange the same without being subject to criminal prosecution and punishment under Section 873 of the Ordinance of the City of Houston, and under Article 717, Texas Penal Code. Additionally, the rice could be condemned, confiscated, forfeited and destroyed under Article 4470, Texas Revised Civil Statutes. The evidence shows that the State agency was prepared to take action if plaintiff's rice was sold or offered for sale with Lindane on it. Also, the shipment of such rice in interstate commerce would have subjected plaintiff to penalties under Sections 333 and 334 of the Federal Act. Having placed the plaintiff in the situation where it could neither retain nor sell the rice in question without violating the Pure Food laws of the City, State and Federal governments, and subjecting itself to prosecution and penalties, the defendant is not in a position to urge that plaintiff acted voluntarily and not under coercion in remilling the rice and thereby preventing such prosecution and penalties, and at the same time mitigating the damages which might have resulted from confiscation and destruction of the rice by the State or other governmental authority.

The cases cited by defendant with respect to voluntary payments are inapplicable to the factual situation in the present case. The retention or sale or offer to sell the rice in question constituted a violation of law, making plaintiff's action necessary to avoid prosecution, penalties and seizure of the rice. Under these circumstances plaintiff's act in remilling the rice was not voluntary but coerced as a matter of law. When one risks prosecution, penalties and fofeiture of his property for noncompliance with law, his act in complying cannot be said to be voluntary. National Biscuit Co. v. State, 134 Tex. 293, 135 S.W. 2d 687; Crow v. City of Corpus Christi, Tex. Sup. 1948, 209 S.W. 2d 922; District of Columbia v. American Security & Trust Co., D.C. Cir. Ct. App. 1953, 202 F. 2d 21; St. John's Electric Co. v. City of St. Augustine, Fla. S. Ct. 88 So. 387; 17-A Amer. Jur., Duress and Undue Influence, Secs. 7, 14, p. 875; 21 Tex. Jur. 2d, p. 116, Duress & Coercion, §2.

Plaintiff on its appeal complains that the trial court erred in excluding certain evidence relative to lost profits and in denying its motion for lost profits before judgment. We have been unable to find in the record any request by plaintiff for submission of any issue on lost profits as such. The answer of the jury to Special Issue No. 7 awarding damages in the sum of $15,000.00 for the loss of use of plaintiff's mill consumed in remilling the milled rice, necessarily includes lost profits. No judgment for lost profits in any other amount could have been entered without plaintiff's compliance with rule 301, Texas Rules of Civil Procedure. There was no such compliance.

Plaintiff has cited a number of cases in support of the rule that where a business is already established and making

a profit, it is permissible to show the amount of business done in corresponding periods of time not too remote, and the rule that uncertainty of proof as to the amount of lost profits will not defeat recovery so long as there is no uncertainty as to the fact of legal damages. These general rules are not questioned by defendant. In the instant case plaintiff's witness was asked to give oral testimony from some records as to the amounts of rice purchased by plaintiff in October, November and December of 1953, to which question defendant objected because there had been no showing of any comparison between conditions during such period of time and the period of time in issue in this law suit. The objection was sustained. Plaintiff's witness was also asked whether he had an opinion as to the amount of rice he would have bought, to which question the defendant objected as not being based upon facts. No other evidence along such line was offered, although in its bill of exception in the jury's absence such witness testified that he thought "it would be reasonable to suppose" that they would have bought at least 100,000 additional barrels and that he thought "it is reasonable to suppose we would have made at least 50 cents a barrel". We cannot say that the court improperly excluded such testimony, but if there was any error in such connection, we think the exclusion was not harmful in view of all the records and testimony relative to earnings and profits of the business that were admitted in evidence.

In its sixth Point, plaintiff asserts that the court erred in denying interest before judgment upon its damages. Plaintiff sued not only for its damages but for interest thereon as damages. It states in its brief that it continued to sustain damages until June 7, 1956. It is our view that the plain-

tiff is entitled as a matter of law to 6% interest as damages on the $36,246.32 from that date until date of judgment, such interest amounting to $12,239.17. The Texas Co. v. The State of Texas, 154 Tex. 494, 281 S.W. 2d 83; Watkins v. Junker, 90 Tex. 584, 40 S.W. 11; Tortuguero Logging Operation, Ltd. v. Houston, 349 S.W. 2d 315; Ewing v. Wm. L. Foley, Inc., 115 Tex. 222, 280 S.W. 499, 44 A.L.R. 627.

We think there is no merit in plaintiff's contention that it was entitled to a directed verdict or its contention that the court erred in granting a partial summary judgment for defendant in connection with plaintiff's claim for gross negligence and exemplary damages. A careful review of the record shows that there is no evidence that would warrant submission of an issue in connection with alleged gross negligence on the part of the defendant.

The judgment of the Trial Court is reformed by adding thereto interest to date of judgment in the sum of $12,239.17, and, as reformed is affirmed.

/s/ Ewing Werlein,
Associate Justice.

Judgment rendered, and opinion filed November 8, 1962

APPENDIX "B"

REVERSED AND REMANDED
9 FEBRUARY, 1961.

NO. 3798

IN THE

Court of Civil Appeals

FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS,
AT WACO

ORKIN EXTERMINATING COMPANY INC.,
Appellant

v.

GULF COAST RICE MILLS, Appellee

Appeal from District Court
Harris County

OPINION

Gulf Rice Mills filed this suit against Orkin Exterminating Company. Plaintiff alleged that it entered into a written contract with Orkin in 1952 under the terms of which Orkin was to exterminate and control insects, rodents, and pests in plaintiff's mill; that in August, 1955, Orkin sprayed plaintiff's mill with an insecticide or pesticide known as Lindane; that Lindane is poisonous and prohibited by law to be so used; that the application of Lin-

dane to the mill rendered the rice unusable; that the use of Lindane on the interior of the mill was negligence; caused the rice to be unfit for use and adulterated; caused the Federal authorities to prohibit sale of the rice; caused the rice to be injurious to health and unsafe within the meaning of the Federal Food and Drug Act. 21 U.S.C., Sec. 301, et seq.; that the foregoing were proximate causes of damages suffered by plaintiff which were alleged to be some $96,000 (expense for remilling the rice and loss of profits incurred while so remilling the rice).

Plaintiff further alleged that Orkin defaulted and breached its contract in some 17 particulars, summarized: 1) in not controlling insects and mice; 2) in not exterminating in a manner to minimize the possibility of U.S. Food and Drug Administration citing plaintiff; 3) that it did not conduct inspections as agreed; 4) that it did not fumigate as needed; 5) that it used Lindane which did not conform to Federal, State and local laws and ordinances; 6) that it used Lindane which was not acceptable to the rice milling industry because it would contaminate the rice and the mill and subject the mill to civil and criminal proceedings; 7) that it failed to furnish a certificate of insurance showing public liability in amount of $250/500,000; and property damage insurance in amount of $100/100,000.

By reason of the foregoing breaches of contract, plaintiff alleged its damages at $96,000.

Plaintiff further alleged that Orkin defaulted on the express warranty, and implied warranty of its contract, in failing to provide effective insect and rodent control in a safe manner, acceptable to the rice industry; for breach of which plaintiff alleged its damages at $96,000.

Plaintiff prayed for interest from January, 1946; as well as $200,000 exemplary damages for employing Lindane, which plaintiff alleged Orkin knew was a harmful poison, use of which was prohibited by Federal, State and local laws.

Defendant Orkin answered by general denial; contributory negligence; unavoidable accident; alleged that the injuries were caused solely by government agencies operating independently of defendant; alleged that plaintiff's damages resulted from plaintiff's voluntary shutting its mill down and remilling the rice, without legal liability to do so; that the government inspector of the Food and Drug Administrator requested plaintiff to remill its rice, threatening suit if it did not do so, alleging violation of the law in use of Lindane; and that plaintiff voluntarily compromised and settled the government's threatened suit, without being legally bound to do so, and without seeking a judicial determination of the government's claims.

Trial was to a jury.

Defendant filed motion for instructed verdict contending, among other things, that no negligence was shown on defendant's part; that there was no evidence to justify a finding of facts supporting any legal theory of recovery against defendants; and that plaintiff voluntarily remilled its rice without seeking a judicial determination of its liability to do so. This motion was overruled by the Trial Court.

Plaintiff made motion for instructed verdict, contending, among other things: 1) that defendant breached its contract with plaintiff in a number of particulars, and that the undisputed evidence establishes defendant's liability for plaintiff's damages which arose out of these breaches;

2) that the undisputed evidence shows defendant breached its express and implied warranty in its written contract in failing to provide effective insect and rodent control in a safe manner; 3) and in failing to carry out the provisions of its written contract, in using Lindane, which was prohibited by law to be so used.

The Trial Court entered an order granting in part and denying in part plaintiff's motion for instructed verdict. In such order the Court ordered the submission to the jury of issues inquiring whether Orkin's actions regarding the use of Lindane constituted negligence; whether such negligence was a proximate cause of the damages of plaintiff; and what damages, if any, plaintiff suffered from loss of profits. The Court found that plaintiff's damages for remilling the rice were $46,245.32. (The Court further ordered issues concerning the plaintiff's right to recover interest as damages and punitive damages).

The Trial Court then entered an order in Limine, in which the court ordered defendant Orkin not to make argument to the jury "upon the following matters which have been found and concluded as matters of law by the court"; 1) counsel may not argue, comment or remark in any way so as to question the legality, validity or propriety of any acts or omissions of Walter R. Moses or the Federal Food and Drug Administration. 2) Counsel may not argue, comment or remark in any way concerning the necessity of the remilling of the rice by the plaintiff. 3) Counsel may not argue, comment, or remark in any way upon what the law is, or whether any violation of law occured on the part of any person. 4) Counsel may not argue, comment, or remark on any issues contained in the breach of contract case herein.

Defendant requested the submission of a number of issues, among which were: 1) issues inquiring if plaintiff acted as a volunteer without legal objection to do so, in incurring the expense in remilling the rice; 2) and whether or not the actions of Inspector Moses in requiring the remilling of the rice was the sole proximate cause of plaintiff's injury.

The Trial Court refused all issues requested by defendant and submitted issues to the jury which, in answer thereto, found:

1) Application of Lindane by Orkin to plaintiff's rice mill in August, 1955, was negligence.
2) Such was a proximate cause of plaintiff's damages.
3) Gulf Rice Mill lost profits as a result thereof in the amount of $40,000.
4) Orkin's application of Lindane to the rice mill was gross negligence.
5) For which $10,000. exemplary damages should be granted.
6) and 7) Gulf Rice Mills should recover interest from June 7, 1956.

Defendant moved for judgment non obstante veredicto and alleged, among other things: 1) the findings of the jury cannot afford a valid basis for judgment for the plaintiff; 2) the undisputed evidence and the law conclusively show that no legal liability did exist as asserted by the Federal Agency; further that plaintiff incurred its damages by voluntarily compromising the litigation threatened by the Federal Agency, when no legal validity existed as to such threats; and plead for disregard of the findings on exemplary damages.

The Trial Court overruled such motion, except as to the findings on gross negligence and exemplary damages.

The Trial Court then entered judgment:

> "and the Court having found breaches of their contract by the defendant, which breaches were proximate causes of the damages sustained by plaintiff; and the Court having found that defendant defaulted upon its express warranty proximately causing plaintiff's damages; and the Court further finding that * * * its implied warranty was breached, proximately causing damages to the plaintiff; and the Court further finding and being of the opinion that notwithstanding the aforesaid breaches of contract and warranty, the actual damages of $86,245.32 were proximately caused by negligent acts of the defendant as shown by the jury's answers to the special issues."
>
> "It is therefore ordered * * * that (plaintiff) recover from the defendant * * * $105,219.29, being composed of actual damages in the amount of $86,245.32 plus interest from 7 June, 1956 at 6% in the sum of $18,973.97 * * *."

Defendant's motion for new trial was overruled by the Trial Court.

Defendant appeals on 42 points, including among which are: 1) the evidence is insufficient to justify any finding of facts supporting any legal theory of recovery; 2) the Trial Court erred in granting the partially instructed verdict for plaintiff, thereby withdrawing from the jury any issue as to whether defendant breached its contract, and/or defaulted upon its express or implied warranty.

The record reflects that plaintiff Rice Mills entered into a written contract with defendant Orkin Exterminating

Company in 1952, under which Orkin was to exterminate insects and rodents in plaintiff's mill that the insect and rodent situation became so bad that in August, 1955 Orkin sprayed with an insecticide known as Lindane. Thereafter, the Federal Food and Drug Administration and the State Health Department and the City of Houston made some investigation of the use of Lindane at the Rice Mill. All agencies finally in effect delegated to Inspector Moses of the Federal Food and Drug Administration the right to act for them. Inspector Moses told the Rice Mill that the use of Lindane had violated the law; that the Mill was in serious trouble; that the Mill could ship no rice; that such rice was unfit for human consumption; that the rice would be condemned; the buildings padlocked and the Mill and its offices subject to prosecution both civilly and criminally. Inspector Moses' (and the government's) position was that no amount of Lindane was permitted on rice; that no tolerance was established for it, and for that reason the rice was contaminated, and would have to be remilled. The planitiff Rice Mill relied on what Inspector Moses told it (speaking for the Federal, State and City Health Departments), and without contesting, disputing, or litigating, the validity or legality of the claims of Inspector Moses and/or the 3 Health Departments, plaintiff proceeded to remill the rice at an expense of some $46,245. and during such period lost profits which the jury found to be $40,000.

As further pertinent, we note that the record reflects that some 95% of the plaintiff's rice was intended for export to a foreign country. The record further reflects that a great many samplings of the rice were tested for Lindane and that the results of such sampling ran from *none* up to 3.6 parts of Lindane per million parts of rice.

It is further reflected that such amounts are not injurious to health, in any manner.

The Trial Court granted instructed verdict for plaintiff on the contract and breach of express and implied warranty phases of this case. Our examination of the record leads us to the conclusion that there were numerous disputed factual issues in the contract and breach of warranty phases of the case, and that the Trial Court erred in granting an instructed verdict in these respects.

This brings us to a consideration of the tort phase of the case. The Trial Court's submission of issues to the jury is predicated upon the Trial Court's finding that the law had been violated when Lindane was sprayed by Orkin in plaintiff's rice mill. The fact that Inspector Moses certified that the law was violated did not foreclose such matter. (While plaintiff contended that the Federal, State and City of Houston laws had been violated both as to contamination by Lindane and contamination by filth, etc., the case was actually developed and tried on the theory that the use of the Lindane violated the Federal law; and as noted, the State and City of Houston Health Departments, left the matter for both of their agencies, up to Inspector Moses of the Federal Agency. In any event, the proof of violation of the State and local laws, both as to use of Lindane and filth, is inadequate. The City of Houston Ordinances were not introduced in evidence). This brings us to the question of whether the Federal law was in fact violated—as contended so earnestly by Inspector Moses on the trial, and by plaintiff's brief in the instant appeal. The Federal Statutes principally involved are Sec. 342; 346(a); 321; 381 U.S.C.A. (See also 1954 U. S. Code, Congressional and Administrative News; and

1955 Code of Federal Regulations). Sec. (12) 3.41 Title 21, 1955 Code of Federal Regulations provides that such acts shall not become effective for Lindane on grain until *October 31, 1955*. (Application of the Lindane to the rice was in August, 1955). Moreover, (See Section 1 (321 Title 21 U.S.C.) 1954 U. S. Code Cong. & Adm. News, p. 2631), it appears that the statute does not attempt to regulate residue from pesticide chemicals which remain in or on *processed* commodities; and that food *processed* by operations such as *milling* are not subject thereto.

Finally, 95% of plaintiff's rice was intended for export, and under Section 381(3) is not deemed adulterated under the instant chapter U.S.C.

From the record before us, we cannot say that the use of Lindane, in the quantities used, and under the factual situation here involved, was violative of the Federal law.

Moreover, as noted, the record fails to reflect the presence of Lindane in the plaintiff's rice in any quantity injurious to health.

From what has been said, it is our view that plaintiff has not shown a violation of Federal, State, or local law, and that the record does not support recovery on the tort phase of the case. See also: Florida Citrus Exchange v. Folsom, 5th Circuit, 246 F. 2d 850; U. S. v. Lexington Mill & Elevator Co., 232 U.S. 399; Wood Mfg. Co. v. U. S., 286 Fed. 84.

Defendant's contentions set up in this opinion, supra, are sustained, and the cause is REVERSED and REMANDED.

FRANK G. McDONALD
Chief Justice

1) Code of Federal Regulations, Chap. 21, Sec. 120.1 Definitions & Interpretations (12) Section 3.41 "Pesticide Chemicals: extended dates on which statute shall become fully effective.

(a) * * * shall become effective on the dates specified for the following pesticide chemicals * * *.

(2) Effective date October 31, 1955, * * * *Lindane* * * * *Grain* (from treating storage bins)"

2) 1954 Code U.S. Code Congressional & Adm. News, p. 2631 "This bill does not attempt to regulate the residue from pesticide chemicals which may remain on processed, fabricated, or manufactured food other than by limiting the permissible residues on raw agricultural commodities. Food processed by operations such as cooking, freezing, dehydration or *milling* would remain subject to Section 406 rather than being regulated by this bill." (Sec. 406 contains a general declaration that any poisonous or deleterious substance added to food is unsafe except where the substance "is required in the production thereof and cannot be avoided by good manufacturing practice." However, in any case where such a substance is so required or cannot be so avoided (and this is so in case of the use of pesticide chemicals in the production of most raw agricultural commodities) Sec. 406 directs the Secretary of Health, Education, and Welfare to promulgate regulations limiting the quantity on the food to such extent as such secretary finds to be necessary for protection of public health." p. 2632, 1954 U. S. Code Cong. & Adm. News.

3) Title 21 U.S.C.A., Sec. 381(d). A food, drug, device or cosmetic intended for export shall not be deemed to be adulterated or misbranded under this chapter * * *. (U.S.C.A. 1961 pocket part, p. 357).

APPENDIX "C"

STATUTES, REGULATIONS AND ORDINANCES

1. Federal Food, Drug and Cosmetic Act, Title 21, U.S.C.A.:

Section 342: "A food shall be deemed to be adulterated * * * (a) if it bears or contains any poisonous or deleterious substance which may render it injurious to health; * * * or (2) (A) if it bears or contains any added poisonous or added deleterious substance * * * which is unsafe within the meaning of Section 346 of this title, or (B) if it is a raw agricultural commodity and it bears or contains a pesticide chemical which is unsafe within the meaning of Section 346a(A) of this title * * *."

Section 346: "Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for purposes of the application of clause (2) (A) of section 342(a) of this title; but when such substance is so required or cannot be so avoided, the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purposes of the application of clause (2) (A) of section 342(a) of this title. While such a regulation is in effect limiting the quantity of any such substance in the case of any food, such food shall not, by reason or bearing or containing any added amount of such substance, be considered to be adulterated within the meaning of clause (1) of section 342(a) of this title. In determining the quantity of such added substance to be tolerated

in or on different articles of food the Secretary shall take into account the extent to which the use of such substance is required or cannot be avoided in the production of each such article, and the other ways in which the consumer may be affected by the same or other poisonous or deleterious substances."

Section 346(a): (a) Any poisonous or deleterious pesticide chemical, or any pesticide chemical which is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety of pesticide chemicals, as safe for use, added to a raw agricultural commodity, shall be deemed unsafe for the purposes of the application of clause (2) of section 342(a) of this title unless—

(1) a tolerance for such pesticide chemical in or on the raw agricultural commodity has been prescribed by the Secretary of Health, Education, and Welfare under this section and the quantity of such pesticide chemical in or on the raw agricultural commodity is within the limits of the tolerance so prescribed; * * *."

2. Penal Code of the State of Texas, Chapter 2, Title 12 (Vernon's Annotated Statutes, 2 Penal Code 37-38):

Article 707. "For the purposes of this chapter an article shall be deemed to be adulterated: * * * (c) In the case of food; * * * (5) if it contains an added poisonous or other added deleterious ingredient which may render such article injurious to health, * * *."

3. Civil Statutes of the State of Texas (12A. Vernon's Annotated Civil Statutes 325):

Article 4472. "The terms 'adulterated' and 'misbranded', as used in this chapter, shall be held to have the same

meaning as is given those terms in chapter two of title 12 of the Penal Code."

4. Ordinances of City of Houston (City Code of Houston, Texas, 1942, page 454):

Section 868. "For the purposes of this article, an article shall be deemed adulterated: * * * (c) Food. * * * (5) If it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health; * * *."

APPENDIX "D"

NO. 488,534

IN THE

DISTRICT COURT OF HARRIS COUNTY, TEXAS
127TH JUDICIAL DISTRICT

GULF COAST RICE MILLS

v.

ORKIN EXTERMINATING COMPANY, INC.

JUDGMENT

On December 4, 1961, the above entitled and numbered cause came on to be heard. There appeared Gulf Coast Rice Mills, a partnership composed of R. L. Williams and J. M. Chumney, as plaintiff in person and by their attorneys of record; and came Orkin Exterminating Company, Inc., as defendant, in person and by its attorneys of record. All parties announced ready for trial. A jury of 12 good and lawful men and women having been duly impaneled and sworn and having heard the pleadings, the introduction of testimony began.

Having heard the evidence and the argument of counsel, the jury upon their oaths did, for their verdict, in response to the following special issue submitted to them by the Court on December 11, 1961, make the following respective findings:

The Court submits this case to you on special issues and your answers to these issues, which you will make on a separate sheet of paper, will be your verdict. You will

answer such issues without reference to the effect your answers may have upon the judgment to be rendered in this case. In your deliberations you must not discuss any fact or matter which is not based upon the evidence admitted before you under the rulings of the Court.

Let your verdict be signed by your Foreman, whom you will select from your number.

Your verdict must be my unanimous vote.

By the term "negligence", as used in this charge, is meant a failure to do that which a person of ordinary prudence in the exercise of ordinary care would do under the same or similar circumstances, or the doing of that which a person of ordinary prudence in the exercise of ordinary care would not do under the same or similar circumstances.

By the term "proximate cause," as used in this charge, is meant a cause which in a natural and continuous sequence, unbroken by any new and independent cause, produces an event, and without which the event would not have occurred, and to be a proximate cause of an event, it should have been reasonably anticipated and foreseen by a person of ordinary care and prudence in the exercise of ordinary care that the event or some similar event would occur as a natural and probable consequence. There may be more than one proximate cause.

By the term "new and independent cause", as that term is used in the foregoing definition of "proximate cause", is meant the act or omission of a separate and independent agency, which destroys the causal connection between the negligent act, if any, or omission, if any, and the in-

jury complained of, and thereby becomes, in itself, the immediate cause of such injury.

By the term "preponderance of the evidence" is meant the greater weight and degree of credible evidence admitted for your consideration.

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that the application of Lindane in August of 1955 to the rice and premises of Plaintiff was a proximate cause of the damages, if any, sustained by Plaintiff?

Answer: "We do" or "We do not".
Answer: *We do.*

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that the application of Lindane to the rice of Gulf Coast Rice Mills in August of 1955 may have rendered the rice injurious to health?

Answer: "We do" or "We do not".
Answer: *We do.*

In answering the above special issue, you are to use the word "may" in its ordinary meaning and to consider that the rice when prepared as a food may be consumed by the strong and the weak, the old and the young, the well and the sick and it is intended that if the rice because of any added poisonous ingredient may possibly injure the health of any of these, it shall come within the meaning of injurious to health. If the added poisonous ingredient cannot by any possibility, when the facts are

reasonably considered, injure the health of any consumer, such rice, though having a small addition of poisonous ingredient, may not be considered injurious to health.

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that such application which may have rendered the rice injurious to health, if you have so found, was a proximate cause of the damages sustained, if any, by the plaintiff?

Answer: "We do" or "We do not".
Answer: *We do.*

If you have answered Special Issue No. 2 "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that such application which may have rendered the rice injurious to health, if you have so found, was negligence?

Answer: "We do" or "We do not".
Answer: *We do.*

If you have answered Special Issue No. 4 "We do", and only in that event, then answer.

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the damages, if any, sustained by plaintiff?

Answer: "We do" or "We do not".
Answer: *We do.*

SPECIAL ISSUE NO. 6

What sum of money, if any, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff for such damages, if any, as were directly and proximately caused by reason of the application of Lindane to the rice and premises of the plaintiff in August of 1955, taking into account such of the following elements which you find are established by a preponderance of the evidence, and none other:

(a) The cost to plaintiff of remilling rice, if any, directly resulting from the application of Lindane to the rice and premises of the plaintiff in August of 1955;

(b) The cost to plaintiff of cleaning plaintiff's premises, if any, directly resulting from the application of Lindane to the premises of the plaintiff in August 1955;

(c) The difference between the reasonable market value of the milled rice before remilling and the reasonable market value after remilling, directly resulting from the application of Lindane to the rice in August of 1955.

Answer by stating the amount, if any, in dollars and cents.

Answer: *$87,790.07*.

SPECIAL ISSUE NO. 7

What sum of money, if any, do you find from a preponderance of the evidence would reasonably and fairly compensate the plaintiff for such damages, if any, as were directly and proximately caused by the loss of the use of his mill reasonably and necessarily consumed in remilling the milled rice?

Answer by stating the amount, if any, in dollars and cents.

Answer: *$15,000.00.*

You are the sole and exclusive judges of the facts proved, the credibility of the witnesses, and the weight to be given their testimony. The law you are bound under your oaths to receive from the charge of the Court as herein given you and be governed thereby.

/s/ WILLIAM M. HOLLAND
Judge

Such findings were received by the Court and were filed and entered of record on the minutes of the Court.

The Court being of the opinion that judgment should be entered for the plaintiff as follows:

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that Gulf Coast Rice Mills, a partnership composed of R. L. Williams and J. M. Chumney, plaintiff, do have and recover of and from the dedendant, Orkin Exterminating Company, Inc., the sum of Thirty-Six Thousand Two Hundred Forty-Six and 32/100 Dollars ($36,246.32), being composed of the jury's verdict of $42,790.07 reduced by the Court non obstante veredicto to the amount of $36,245.32, plus $1.00 nominal damages for breach of contract insurance provisions; that the plaintiff have interest upon its judgment from date of this judgment at the legal rate of 6%, and recover its costs incurred herein, for all of which let execution issue.

Defendant duly excepted to the foregoing judgment in open Court and gave notice of appeal to the Court of Civil Appeals for the First Supreme Judicial District at Houston, Texas.

RENDERED, ENTERED and SIGNED at Houston, Texas on ____ day of January, 1962.

/s/ WILLIAM M. HOLLAND
Judge

APPROVED AS TO FORM ONLY:

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No. 424

IN THE

Supreme Court of the United States

October Term, 1963

ORKIN EXTERMINATING COMPANY, INC.,
Appellant

v.

GULF COAST RICE MILLS, *Appellee*

MOTION TO DISMISS

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IN THE

Supreme Court of the United States

No. 424, October Term, 1963

ORKIN EXTERMINATING COMPANY, INC.,
Appellant
v.
GULF COAST RICE MILLS, *Appellee*

MOTION TO DISMISS

The appellee Gulf Coast Rice Mills moves to dismiss the appeal on the grounds that the judgment rests on adequate, non-federal basis, that no federal question was raised or preserved below, that the Texas state court did not rule on the late federal claim, that the issue is moot, and that the appeal was docketed out of time.

OPINION BELOW

The opinion below is reported at 362 S.W. 2d 159. See Appendix A.

JURISDICTION

1. *The judgment rests on adequate non-federal basis, because the judgment would be the same under state pure food statutes alone, or under city pure food ordinances alone.*

The judgment is based upon adequate and independent non-federal grounds, being the pure food laws of the State

of Texas and the City of Houston. *Texas Penal Code (Vernon's)* Articles 706, 707, 717. *Texas Revised Civil Statutes (Vernon's)* Articles 4466, 4470-4472. *City of Houston Code*, Section 861-880 (Plf. Ex. 26; S.F. 362-380).*

Breaches of the state law and city ordinances on food adulteration were pleaded by the rice mill as being violated and causing its damages. (Tr. Vol. II, pp. 4-6, 8-9)** Proof of their violation was made and is in the record. (S.F. 44, 45, 245, 233-235, 287, 281, 304-305, 309-310, 314-315, 295-297, 299, 75, 401-402) The jury found facts showing their violation and damages resulting therefrom by its answers to Special Issues No. 2 through 7, inclusive. (Tr. Vol. II, pp. 49-50) The trial court found that there was proof showing violation of the State food statutes and violation of the city food ordinances by submitting issues upon whether the Lindane poison may have rendered the rice injurious to health, and by refusing the exterminating company's motion for judgment non obstante veredicto. The Texas Court of Civil Appeals found that the jury's finding, being Special Issue No. 2, has support in the evidence. The Texas Supreme Court has concurred with those findings and the breaches of state and city laws by refusing to grant an application for writ of error.

Both the state statute and the city ordinance provide that food is adulterated if it contains any added poisonous

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*S.F. refers throughout to the Statement of Facts, the record which has been filed herein.

**TR. refers throughout to the Transcript.

or deleterious substance which may render it injurious to health.

In the opinion below at 362 S.W. 2d, the Court of Civil Appeals points out at pages 163, 164 the pleadings that the state law was violated and that the city law was violated. At page 164 the Court then says:

> ". . ., there is nevertheless evidence showing that a number of samples were taken and that the results of many samplings showed from 0.2 to 3.6 parts per million of Lindane, and that the addition of such parts of Lindane to milled rice may render it injurious to health."

The finding that the Lindane application may render the rice injurious to health constitutes adulteration of the food under both the state statutes and the city ordinances.

At page 165 of the opinion, the Texas Court of Civil Appeals holds that the application of Lindane by the exterminating company had adulterated the rice and rendered the rice mill partners subject to criminal prosecution and punishment under both the state statutes and the city ordinances.

Even if the Federal Food, Drug & Cosmetic Act had not been pleaded and violations theerunder proven, the judgment below would have been the same under either the State of Texas pure food law alone, or under the City of Houston ordinances alone.

A state court judgment will not be reviewed when based upon adequate, independent, non-federal grounds. *Fox Film Corp. v. Muller*, 296 U.S. 207, 209, 210.

2. *A fact issue being the only question preserved, will not be reviewed because its determination was for the jury and state courts.*

A fact question was the only question preserved for appeal by the exterminating company. It was whether there was any evidence to support the jury verdict.

Under procedure in the state court of Texas, a party may appeal from the overruling of his motion for judgment non obstante veredicto alone, without moving for a new trial. Rule 324, *Texas Rules of Civil Procedure*. However, where a party elects to appeal from the denial of motion for judgment non obstante veredicto, he is limited on appeal solely to the alleged error in overruling such motion and the points raised therein. Any other claim or complaint is waived. Rule 324, *Texas Rules of Civil Procedure*. *Freed v. Bozman*, 304 S.W. 2d 235, 241; *Trice Production Co. v. Dutton Drilling Co.*, 333 S.W. 2d 607, 616, 617.

The exterminating company did not present in its motion for judgment non obstante veredicto any question or complaint of a constitutional nature, or of application of any law, federal, state or city. The exterminating company's only complaint was that there was no evidence to support the judgment. That sole point which was preserved has been determined against the exterminating company by the jury, the trial court, the Texas Court of Civil Appeals and the Supreme Court of the State of Texas. There is such evidence in the record and it has been found sufficient. (S.F. 42-49, 51-52, 74-77, 245, 258, 295-297, 299-315, 362 S.W. 2d 159 at 163-166.)

Jurisdiction is not exercised to review a decision of the jury and state courts upon a question of fact. *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160. Seventh Amendment, United States Constitution.

3. *There is no basis for appeal because the validity and constitutionality of statutes were not drawn in question not being mentioned until after the appellate opinion was rendered.*

The validity or constitutionality of statutes were not drawn in question in the state court proceedings, as required by Section 1257, 28 U.S.C.

The exterminating company did not plead or present any question on validity or unconstitutionality in the trial court, either before or after judgment. Further, it did not present such question in any form upon appeal to the Court of Civil Appeals.

It was not until after rendition of the opinion on appeal that the exterminating company for the first time, by way of motion for rehearing, questioned validity or constitutionality.

Thus, validity was not "drawn in question", and no right, privilege or immunity was "specially set up or claimed", as required by Section 1257 of 28 U.S.C. *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390, 391.

4. *There is no basis for appeal because no federal question was raised in the state court, the first federal complaint being by motion for rehearing after the appellate opinion was rendered.*

Rule 279 of *Texas Rules of Civil Procedure* provides in part as follows:

> "Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; . . ."

The exterminating company first attempted to raise a question of validity or constitutionality by rehearing after the decision on appeal. A complaint made for the first time by motion for rehearing in the Texas Court of Civil Appeals will not be considered. *Quinn v. Wilkerson*, 195 S.W. 2d 399, 404; *Herndon v. Georgia*, 295 U.S. 441, 443; *Radio Station WOW v. Johnson*, 326 U.S. 120, 128.

5. *There is no basis for appeal because there was no Texas state court ruling on the late constitutional claims.*

No federal claim or complaint was made until after rendition of the decision complained of, and the state court opinion is completely silent on the late constitutional claims. Under these circumstances, jurisdiction should be declined. *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 309. It is presumed that the silence is due to the procedural deficiency. *Bailey v. Anderson*, 326 U.S. 203, 206-7.

6. *There is no ground to permit the exterminating company to inject constitutionality after appeal because there was no surprise.*

The exterminating company recognizes that it did not attempt to raise any federal question until motion for rehearing after the opinion of the State appellate court was entered. Although the exterminating company has actively litigated this suit since 1957, it now attempts to obtain review by claiming surprise.

There was no surprise for the following, among other, reasons:

(a) The city, state, and federal health authorities notified the exterminating company's manager in person immediately following this occurrence in 1955 that any amount of the poison Lindane contaminated and adulterated the rice. (S.F. 63-64, 74-78)

(b) The rice mill's pleadings on file for several years before trial specially alleged in detail and by sections the particular city ordinances, state statutes and federal statutes that were violated. The manner and circumstances under which they were violated were pleaded, including violation of the Federal Food, Drug, & Cosmetic Act by the application of any amount of Lindane poison, and violations of city and state food laws by addition of the Lindane poison to the milled rice so that it may be rendered injurious to health. (Tr. Vol. II, pp. 4-6, 8-9)

(c) Voluminous pre-trial depositions and discovery procedures were exhausted, so that the exterminating company was fully apprised of the rice mill's position, and how it charged food laws were violated and the exterminating company was negligent.

(d) As pleaded and proven by the rice mill, the trial court ruled that the application of any amount of Lindane poison to the milled rice violated the Federal Food, Drug, & Cosmetic Act, 21 U.S.C., Section 324(a)(2). This ruling was known to the exterminating company during trial, before submission of the charge to the jury and before entry of the judgment. No complaint of application, validity or constitutionality was made in either the trial court or on appeal to the Texas Court of Civil Appeals.

(e) Regarding application and constitutionality of the "may render injurious" provisions in the city, state, and federal laws, the trial court submitted to the jury a special issue on this fact question (Special Issue No. 2), together with appropriate instructions thereon taken directly from *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399. The exterminating company made no complaint of validity, application or constitutionality in the trial court, either before or after judgment, nor on appeal to the Texas Court of Civil Appeals.

(f) The judgment and opinion in the trial court and state appellate court found that there was evidence supporting violation of city, state, and federal laws, as the rice mill had been pleading and urging for 4 years before this trial.

There was no surprise.

Federal questions were not claimed in the state courts until petition for rehearing in the appellate court, which is too late. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128.

7. *There is no basis for appeal because there is no controversy; further, the issue is moot.*

The occurrence made the basis of this suit was a single, isolated episode in 1955. The determination of this suit will decide nothing insofar as the public is concerned.

The record indicates that the exterminating company used the poison, Lindane, only this one time. The opinion below, 362 S.W. 2d 159 makes this finding at p. 164:

"... The evidence and the record before us show that Lindane was not required in the production of

> rice and that its use could have been avoided. Indeed, Lindane had been used only once in connection with appellee's mill from 1940 to 1955, and then it was used without the knowledge of the appellee or the health authorities. From the time of the application in August, 1955 Lindane has not been used down to the date of the second trial in 1961."

Thus, the record reflects that the exterminating company only once used the poison Lindane on milled rice and has not used it again since 1955. Its use for this purpose is wholly unnecessary and insects are controlled without it.

The issue, so far as the public and the industry are concerned is moot. This case itself would be moot, except for the requirement of payment for the damaged rice by the insurance carrier of the exterminating company. By written contract the exterminating company and the rice mill agreed that this insurance would be carried. (Plf. Ex. 1-A, Section H. S.F. 19-23).

Jurisdiction is not exercised to rule upon an isolated episode of academic interest. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79; *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393.

8. *The appeal has not been perfected because it was docketed out of time.*

The appeal should be dismissed because it has not been timely made.

Rule 13(1), Rules of the Supreme Court, requires that the case be docketed not more than 60 days after the filing of the notice of appeal. The notice of appeal was filed on

July 1, 1963. The time for docketing the case expired on August 30. The case was docketed thereafter on August 31, 1963.

No application for enlargement of time was sought before expiration of the 60 day period. No enlargement of time was obtained.

The appeal, not being taken in conformity to the rules, should be dismissed. Rule 16(1)(a), Rules of the Supreme Court.

QUESTIONS PRESENTED

1. Whether, after the exterminating company had made a heavy application of pesticide containing the toxic and deadly poison, Lindane, directly to milled rice ready for consumption, and the jury found negligence, as well as breaches of city, state and federal food laws, the trial court and both state appellate courts were wrong in refusing to set aside the judgment as being unsupported by any evidence?

2. Whether the exterminating company may now urge constitutional claims, when it did not mention constitutional claims in the trial court, when it did not mention constitutional claims in the state appellate court until after the opinion was rendered, when the state court has not ruled upon these late claims, and when there was no surprise to the exterminating company by the opinion because the city, state and federal food laws and their application had been pleaded specifically?

Challenges To Appellant's Statement of Questions.

Besides the objection that the exterminating company's "questions presented" were not "presented," the questions stated are subject to these additional objections:

(a) The state court in the opinion below did not construe the state and city pure food laws as prohibiting "any" amount of the poison Lindane. Such holding is unnecessary to the decision. The Texas Court of Civil Appeals did hold that there was support in the evidence for the jury's finding that the application of the poison by the exterminating company to the milled rice may have rendered the rice injurious to health. That finding and holding sufficed to show violations of both state statutes and city ordinances under their "may render injurious" provisions. The additional statement that there was substantial evidence showing that Lindane in "any" quantity on rice may render it injurious to health was not necessary to support the judgment, but shows that there was evidence in the record of Lindane being so toxic and dangerous that any amount on milled rice may be injurious. (S.F. 295, 296, 299, 303-306, 309-310)

(b) There is no conflict between the city and state laws and the federal regulations. The "may render injurious" provision of the state and city laws are virtually identical to the "may render injurious" provision of the federal act. 21 U.S.C., Section 342(a)(1). The federal regulations did not provide that "such food", here milled rice, may contain up to 10 parts per million of Lindane. The tolerance was only established upon certain fruits and vegetables where use was necessary to production, where the poison would be dissipated, and where it would be washed or otherwise removed before consumption. Such tolerance was available only upon raw agricultural commodities, unmilled commodities, and was not granted for Lindane upon milled rice.

(c) The federal regulations do not sanction the use of Lindane on milled rice in any amount.

STATUTES, ORDINANCES AND REGULATION INVOLVED*

1. *City Ordinances.*

The city health ordinances involved are Sections 861-880, City of Houston Code (Plf. Ex. 26; S.F. 362-380). Section 868 provides in part as follows:

"Sec. 868. Adulterated Articles.

For the purposes of this article, an article shall be deemed adulterated: ***

(c) Food. ***

(5) If it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health; . . ." (Plf. Ex. 26; S.F. 362, 366-368.)

2. *State Statutes.*

The state health statutes involved are Texas Penal Code (Vernon's Articles 706, 707, 717; and Texas Revised Civil Statutes (Vernon's) Articles 4466, 4470, 4471, 4472.

Article 707, Texas Penal Code (Vernon's) provides in part as follows:

"Article 707. 'Adulterated'.

For the purposes of this chapter an article shall be deemed to be adulterated: ***

(c) In the case of food: ***

(5) if it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health, . . ."

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*All citations throughout are for the year 1955

3. *Federal Statutes.*

The pertinent federal statute is the Federal Food, Drug, & Cosmetic Act, 21 U.S.C., Sections 301 et seq., especially Section 342,(a)(1) and (2), as they appeared in 1955. (Plf. Ex. 28; S.F. 421-423.)

Section 342(a)(1)(2) then provided in part as follows:

"Section 342. *Adulterated Food.*

A food shall be deemed to be adulterated —

(a) Poisonous, insanitary, etc., ingredients.

(1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health, but in case the substance is not an addded substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or (2) if it bears or contains any added deleterious substance, except a pesticide chemical in or on a raw agricultural commodity, which is unsafe within the meaning of section 346 of this title, or if it is a raw agricultural commodity and it bears or contains a pesticide chemical which is unsafe within the meaning of section 346a (a) of this title; . . ."

4. *Federal Regulation.*

The pertinent federal regulations is 21 Code of Federal Regulations, Section 120.1(e), which provided as follows:

"Sec. 120.1 Definitions and interpretations. ***

(e) Raw agricultural commodities include, among other things, fresh fruits, whether or not they have been washed and colored or otherwise treated in their unpeeled natural form; vegetables in their raw or natural state, whether or not they have been stripped of their outer leaves, waxed, prepared into fresh green salads, etc.; grains, nuts, eggs, raw milk, meats, and similar agricultural produce. It *does not include* foods that have been *processed*, fabricated, or manufactured by cooking, freezing, dehydrating, or *milling*." (Emphasis added)

STATEMENT

The rice mill and the exterminating company entered a written contract whereby, for monthly payments, the exterminating company agreed to control insects and rodents, and to use only materials allowed by law and acceptable to the industry. (Plf. Ex. 1-A, Secs. A., B., C.; S.F. 12-16)

The appellee is a long-established rice mill business. A rice mill has been operated on its premises continuously since 1913, and partner R. L. Williams has operated the mill there since 1935. (S.F. 239-242) In the 1950's, the mill's average sales were about $4,000,000 per year. (S.F. 242)

Since there was great danger in the application of poisonous insecticides directly to the processed foodstuff, rice, (Plf. Ex. 15; S.F. 249), the mill paid for and the exterminating company contracted to carry public liability insurance in the amount of $250,000/$500,000, contractor's liability insurance in the amount of $250,000 $500,000, and property damage insurance in the amount of $100,000 (Plf. Ex. 1-A, Sec. H; S.F. 19-23).

In the latter part of 1955 the exterminating company permitted insects and rodents to become completely out of control. (S.F. 65-68, 134-140, 261, 266).

In August, 1955, the exterminating company made a heavy application of pesticide containing the poison Lindane, to the entire stores of rice, the mill and the warehouse. There was approximately $1,000,000 worth of rice poisoned. (S.F. 42-48, 51-52, 74-77, 245, 258)

Lindane is the common name for the gamma isomer of benzene hexachloride. It is poisonous and toxic. It can cause death in humans. (S.F. 296-297, 306, 309-310).

To remove the Lindane poison the rice mill had to remill rice and thoroughly clean the premises. Over 3,000,000 pounds had to be remilled. The rice mill was out of the market for three months at the height of the season. This was at great expense to the rice mill. (S.F. 57, 74-77, 120-132, 384-386, 393-394, 397-399).

This suit is for damages to milled rice only, which had to be remilled to remove the poison contamination. (S.F. 42-47, 76-77, 119, 232, 401-402).

The heavy application of the poison was discovered and a meeting was held by representatives of the city health authorities, state health authorities, federal health authorities, the rice mill and the exterminating company. (S.F. 47-52, 63-64, 69-78). All food and drug agencies, city, state and federal, notified the rice mill and the exterminating company that the rice was adulterated by the Lindane poison, and that it could not be sold, offered for sale, or moved in commerce. (S.F. 47-52, 63-64, 69-78, 408-409). The rice mill was notified that it would be subjected to civil

and criminal provisions of the law. (S.F. 276-282, 401-402, 408-409). 362 S.W. 2d 159 at 165.

The Director of the Texas State Division of Food and Drugs testified that the state agency was prepared to take action by filing suit, obtaining a restraining order and exercising the seizure provisions of the Texas food law. (S.F. 277-282).

The Texas pure food statutes provide that food shall be deemed adulterated if it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health. The Texas statutes also provide for seizure, destruction, civil and criminal penalties. Texas Penal Code (Vernon's), Articles 706, 707, 717. Texas Civil Statutes (Vernon's), Articles 4466, 4470, 4472.

The City of Houston had in effect ordinances containing similar provisions for adulteration by added poisonous or deleterious ingredients which "may render such article injurious to health." The ordinances contained other provisions making violation an offense subject to fine and subjecting the food to seizure and destruction. City of Houston Code, Sections 861-880. (Plf. Ex. 26; S.F. 362-380).

There is abundant evidence in the record that the Lindane poison adulterated the milled rice. This testimony was received from a medical doctor specializing in poisons, from a qualified biochemist, from the Director of the Texas State Division of Food and Drugs, as well as from others. (S.F. 295-297, 299, 304-305, 309-310, 315, 74-77).

The jury found as a fact that the application of the poison Lindane to the rice may have rendered it injurious to health. That there is evidence in support of that finding

has been upheld by the trial court, the Court of Civil Appeals and the Supreme Court of the State of Texas.

The occurrence made the basis of this suit, the application of the poison Lindane to the milled rice, represents a single, isolated occurrence. To the knowledge of the rice mill, Lindane had never previously been applied to its rice. This is the only instance where it was discovered by health authorities. Since the occurrence in August, 1955, Lindane has not been used again. 362 S.W. 2d 159 at 164. The use of Lindane poison in production of rice is demonstrated to be unnecessary and undesirable.

SUMMARY OF ARGUMENT

The judgment sought to be reviewed was correctly determined. The "may render injurious" provisions of city and state food laws, as well as the federal act, were applied and interpreted in accordance with the Supreme Court's decision in the *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399.

The Supreme Court decision in the *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, which was followed here, precludes any question. There is no conflict of decisions, but rather established law has been followed.

The decision of this case has no significance to other litigants or to the public. The record shows that during 21 years of rice mill operation, both before and after the incident made the basis of this suit, the insecticide containing the poison Lindane was applied only one time. There is no significance in the case to the nation or to the public, and would not arise again between these parties or in the industry.

The only issue preserved by the exterminating company for review was a fact question of whether there was any evidence to support the jury findings. The jury determination of fact and the evidence supporting it has been confirmed by the state trial court and two state appellate courts.

ARGUMENT

1. *The judgment below was clearly correct because violations of city, state and federal food laws were shown.*

The exterminating company by its written contract agreed to use only pesticides which conformed to state, city and federal law, and which were acceptable to the industry. (Plf. Ex. 1-A, Sections A., C 1; S.F. 12, 13, 15). It also contracted to minimize the possibility of citation by the Food and Drug Administration. (Plf. Ex. 1-A, Sections B. 1., 2; S.F. 13).

The exterminating company made an extremely heavy application of insecticide containing the poison Lindane to the entire stores of rice, the mill and the warehouse. The poison was in a dust carrier, was applied by a power driven blower, and there was no part of the rice or mill which was not covered by Lindane. (S.F. 42-49, 51-52, 74-77, 245, 258, 291-295, 299).

The City of Houston ordinances provided that a food is adulterated and unfit for sale if it contains any added poisonous or deleterious ingredient "which may render such article injurious to health." *City of Houston Code*, Sections 861-880 (Plf. Ex. 26; S.F. 362-380).

The state food and drug statutes contained similar "may render injurious" provisions, with attendant civil

and criminal penalty provisions. Articles 4466, 4470, 4471, 4472, *Texas Civil Statutes (Vernon's)*. Article 706, 707, 717, *Texas Penal Code (Vernon's)*.

The Federal Food, Drug, & Cosmetic Act likewise had a "may render injurious" provision that food is adulterated if it contains any added poisonous or deleterious substance which may render it injurious to health. 21 U.S.C., Section 342(a)(1). (Plf. Ex. 28; S.F. 423)

The jury found that the application of Lindane to the rice may have rendered it injurious to health. (Special Issue No. 2, Tr. Vol. 1). There is abundant evidence in support of this finding. There is the testimony of a medical doctor, who is a specialist in poisons and a professor of internal medicine. His testimony is at S.F. 299-310. There is the testimony of a biochemist who was familiar with Lindane and its effect upon humans. His testimony is at S.F. 311-315. There is the testimony of the Director of State of Texas Food and Drug Division, who is a registered pharmacist and chemist. His testimony is at S.F. 269-282, 291-299.

The trial court has found evidence supporting this verdict by his submitting the issue to the jury and entering judgment upon the verdict. The Texas Court of Civil Appeals has expressly found evidence supporting the verdict. See opinion below, 362 S.W. 159 at 163-165.

The judgment was correctly entered upon violations of the "may render injurious" provisions of the city ordinances, state statutes and the federal act.

In addition to the state and city law violations, there is an independent federal ground to support the judgment.

The Federal Food, Drug, & Cosmetic Act prohibits any amount of Lindane upon milled rice. 21 U.S.C., Section 342(a)(2). That section provided that a food is adulterated "if it bears or contains *any* added poisonous or added deleterious substance, except a pesticide chemical in or on a raw agricultural commodity, which is unsafe within the meaning of section 346 of this title, or if it is a raw agricultural commodity and it bears or contains a pesticide chemical which is unsafe within the meaning of section 346a (a) of this title." (Emphasis added.)

By definition, milled rice is not a raw agricultural commodity and the exceptions in this section do not apply. 21 C.F.R., Sec. 120.1(e). It therefore was adulterated because it contained *any* amount of added poisonous or added deleterious substance, namely Lindane.

The trial court correctly found this to be a violation, as shown by submission of Special Issue No. 1 to the jury on whether the Lindane application was a proximate cause of the damages, not predicated upon any prior finding.

The Court of Civil Appeals opinion correctly found that the application of any amount of Lindane poison to the milled rice violated this section. 362 S.W. 2d 159 at 164-165.

The case has been correctly decided and does not require review.

2. *There is no substantial question because the outcome here will be immaterial to the public and the industry.*

The act of the exterminating company giving rise to this suit, being the application of the poison Lindane to

milled rice in 1955, was an isolated incident. See the opinion below, 362 S.W. 159 at 164. The decision will not affect any other parties and, indeed, will not affect even these parties in the future since there is no occasion for it to recur.

For the 6 years of this litigation the fiction has been preserved throughout that the exterminating company is the party at interest contesting the outcome. This gives it the appearance of a controversy over the use of Lindane on milled rice.

The fact is that its insurance carrier has been the litigant throughout, and this use of Lindane is immaterial to the exterminating company.

There being no necessity for using Lindane on milled rice, the outcome of this litigation will determine nothing so far as the public or the industry is concerned.

The decision here determines this single incident, and jurisdiction is not exercised for a single episode. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74.

3. *There is no substantial question because the issue is foreclosed by the Supreme Court decision.*

The interpretation to be given to the "may render injurious" provision of the federal act was established by the Supreme Court in *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399.

The trial court in submitting its issue to the jury carefully set out by accompanying instruction the interpretation to be given to the term "may render injurious", taking the instruction almost verbatim from the Supreme Court's

opinion in the *Lexington Mill* case. See charge to the jury, Special Issue No. 2 with instruction, at Tr. Vol. I.

In view of this long established construction by the Supreme Court, there is no substantial question or controversy, and jurisdiction should be denied. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311; *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390.

4. *There is no question for review because long settled Supreme Court interpretation has been followed.*

There is no conflict between the case at bar and the decisions of this Court. To the contrary, the decision of the Supreme Court in *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, was recognized and applied by the trial court, including its incorporation in the charge to the jury. The Court of Civil Appeals in its opinion has recognized and applied this decision. 362 S.W. 2d 159, 163.

The Supreme Court decision has been followed and there is no conflict to review.

5. *The only issue preserved for appeal, a fact issue, should not be reviewed because the facts found have had the concurrence of jury, trial court and two Texas state appellate courts.*

The exterminating company did not make any complaint of the judgment other than by motion for judgment non obstante veredicto. Its appeal was solely upon denial of that motion, and it raised only one question, whether there was any evidence to support the verdict and judgment. Any other question was waived for appeal. Rule 324, *Texas Rules of Civil Procedure*, 362 S.W. 2d 159, 163-164.

The jury determined the facts against the exterminating company. The trial court and the Court of Civil Appeals have found that there was evidence supporting the verdict. 362 S.W. 2d 159, 163-164. The Texas Supreme Court has refused review, stating "no reversible error."

These determinations are binding. The Seventh Amendment to the Constitution of the United States provides that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law."

Where the jury's determination of fact has received concurrence of the trial court and the appellate courts, the Supreme Court does not undertake review. *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275.

6. *The state food statutes and the city food ordinances are effective because the federal government has not pre-empted food regulation.*

The federal government has not pre-empted the regulation of food sanitation. All 50 states of the Union have and apply their own pure food and drug acts. See Vol. 3 CCH Food, Drug, & Cosmetic Law Reporter.

The exterminating company has cited two cases under its pre-emption argument. *Oregon-Washington R. & N. Co. v. Washington*, 270 U.S. 87; and *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148. Neither is applicable here. The former case is on pre-emption in a limited aspect of the quarantine field, and the latter case regards pre-emption by the federal government of the interstate transportation and sale of renovated butter made from packing stock butter.

It was early held that the state acts were valid and enforceable as against the argument of federal government pre-emption. *Hebe Co. v. Shaw*, 248 U.S. 297, 303, 304; *Corn Products Refining Co. v. Eddy*, 249 U.S. 427.

CONCLUSION

We respectfully submit that the judgment rests on adequate, non-federal basis, that no federal question was raised or ruled upon, that there is no substantial question, that the fact issue was correctly decided, and that the appeal should be dismissed.

Respectfully submitted,

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September 24, 1963

APPENDIX "A"

ORKIN EXTERMINATING COMPANY, INC.,
Appellant,
v.
GULF COAST RICE MILLS, Appellee

No. 13998.

Court of Civil Appeals of Texas

Houston.
Nov. 8, 1962.

Rehearing Denied Nov. 29, 1962.

WERLEIN, Justice.

This suit was brought by plaintiff, Gulf Coast Rice Mills, against Orkin Exterminating Company to recover damages allegedly growing out of breach of contract and negligence of the defendant. Both plaintiff and defendant have perfected appeals to this Court from the judgment rendered by the trial court on the second trial of the case. From the judgment of the District Court rendered on the first trial, an appeal was taken by the defendant and the judgment was reversed and the cause remanded by the Waco Court of Civil Appeals. Orkin Exterminating Company, Inc. v. Gulf Coast Rice Mills, Tex.Civ.App., 343 S.W.2d 768, dism. w.o.j.

A summary of plaintiff's pleadings, which were identical on both trials, is given in the opinion of the Waco Court We quote from such summary as follows:

> "Plaintiff alleged that it entered into a written contract with Orkin in 1952 under the terms of which

Orkin was to exterminate and control insects, rodents, and pests in plaintiff's mill; that in August, 1955, Orkin sprayed plaintiff's mill with an insecticide or pesticide known as Lindane; that Lindane is poisonous and prohibited by law to be so used; that the application of Lindane to the mill rendered the rice unusable; that the use of Lindane on the interior of the mill was negligence; caused the rice to be unfit for use and adulterated; caused the Federal authorities to prohibit sale of the rice; caused the rice to be injurious to health and unsafe within the meaning of the Federal Food and Drug Act. 21 U.S.C.A. § 301 et seq.; that the foregoing were proximate causes of damages suffered by plaintiff which were alleged to be some $96,000 (expense for remilling the rice and loss of profits incurred while so remilling the rice.)"

The plaintiff also alleged violations of certain provisions of the laws of the State of Texas and ordinances of the City of Houston, and pled that Orkin had defaulted and breached its contract in some 17 particulars. These breaches are summarized in the opinion of the Waco Court of Civil Appeals. That Court on the record before it held that the trial court erred in granting the partially instructed verdict for the plaintiff, thereby withdrawing from the jury any issues as to whether defendant breached its contract, or defaulted upon its express or implied warranty, since there were numerous disputed fact issues in the contract and breach of warranty phases of the contract. With respect to the tort phase of the case, the Court held that the record did not support any recovery.

On the second trial, the court overruled plaintiff's and defendant's motions for an instructed verdict, and submitted the case on seven special issues to which the jury

found in substance; (1) that the application of Lindane in August, 1955, to the rice and premises of plaintiff was a proximate cause of damages sustained by plaintiff; (2) that such application to the rice may have rendered it injurious to health; (3) that such application was a proximate cause of plaintiff's damages, and (4) was negligence; (5) that such negligence was a proximate cause of plaintiff's damages; (6) that $27,790.07 was the sum of money that would fairly and reasonably compensate plaintiff for such damages as were caused by application of Lindane to the rice and premises of plaintiff, taking into account (a) cost of remilling the rice, (b) cost of cleaning plaintiff's premises and (c) difference between reasonable market value of rice before and after remilling, directly resulting from the application of Lindane in August, 1955; and (7) that $15,000.00 would fairly and reasonably compensate plaintiff for such damages as were directly and proximately caused by loss of use of plaintiff's mill reasonably and necessarily consumed in remilling the milled rice.

The trial court on hearing defendant's motion for judgment non obstante veredicto, reduced the jury's finding of $27,790.07 in answer to Special Issue (6) to $21,245.32 because plaintiff's pleading limited such items of damages to that amount, and otherwise overruled such motion and entered judgment for plaintiff in the total sum of $36,246.32, being the reduced amount of the verdict plus $1.00 nominal damages for breach of contract insurance provisions.

Orkin contends that the trial court erred in overruling its motion for an instructed verdict and judgment non obstante veredicto when there was no evidence to support

any cause of action or legal theory of recovery, and the law of the case and the evidence showed that the record did not support recovery on the tort phase of the case. Orkin states that the statement of the nature of the case on pages 768-772 of the opinion of the Waco Court is correct and it adopts the same. It asserts that the pleadings and evidence were the same in both trials, except for defendant's additional allegation as to the law of the case made in its third amended original answer filed subsequent to the opinion handed down by the Waco Court. The Waco Court's summary of the evidence adduced on the first trial is as follows:

> "The record reflects that plaintiff Rice Mills entered into a written contract with defendant Orkin Exterminating Company in 1952, under which Orkin was to exterminate insects and rodents in plaintiff's mill; that the insect and rodent situation became so bad that in August, 1955 Orkin sprayed with an insecticide known as Lindane. Thereafter, the Federal Food and Drug Administration and the State Health Department and the City of Houston made some investigation of the use of Lindane at the Rice Mill. All agencies finally in effect delegated to Inspector Moses of the Federal Food and Drug Administration the right to act for them. Inspector Moses told the Rice Mill that the use of Lindane had violated the law; that the Mill was in serious trouble; that the Mill could ship no rice; that such rice was unfit for human consumption; that the rice would be condemned; the buildings padlocked and the Mill and its offices subject to prosecution both civilly and criminally. Inspector Moses' (and the government's) position was that no amount of Lindane was permitted on rice; that no tolerance was established for it, and for that reason the rice was contaminated, and would

have to be remilled. The plaintiff Rice Mill relied on what Inspector Moses told it (speaking for the Federal, State and City Health Departments), and without contesting, disputing, or litigating, the validity or legality of the claims of Inspector Moses and/or the 3 Health Departments, plaintiff proceeded to remill the rice at an expense of some $46,245. and during such period lost profits which the jury found to be $40,000.

"As further pertinent, we note that the record reflects that some 95% of the plaintiff's rice was intended for export to a foreign country. The record further reflects that a great many samplings of the rice were tested for Lindane and that the results of such samplings ran from *none* up to 3.6 parts of Lindane per million parts of rice. It is further reflected that such amounts are not injurious to health, in any manner."

It is Orkin's contention that the facts in evidence pertaining to the negligence phase of the case are substantially the same as on the first trial, and that for such reason the specific findings of law made by the Waco Court are binding upon this Court as the law of the case. We think it unnecessary to set out such findings since they may be found on pages 771-772 of the Court's opinion. It is our view that there are some substantial differences between the evidence adduced at the first trial and at the second trial. Several medical witnesses testified on the first trial who did not testify on the second trial. The applicable ordinances of the City of Houston were not introduced on the first trial but were introduced on the second trial. On the second trial, there is no evidence that the City and State agencies delegated to Inspector Moses the right to act for them, although they may have agreed that Federal, State and City food laws have been violated. Other differences will appear in the course of this opinion.

Plaintiff asserts that the answers of the jury to the special issues submitted constitute findings against Orkin on both the contract and tort phases of the case. Plaintiff requested certain more specific issues with respect to breaches of contract by Orkin, which were refused by the trial court. Any error of the trial court in refusing such issues has not been preserved by plaintiff and cannot be considered by this Court. The special issues submitted are limited to the use and application of Lindane and do not encompass any damages resulting from infestation of the rice by insects or rodents.

The contract does not make specific mention of Lindane. It specifies the scope of work and controlled service to be rendered by Orkin, and with respect to material to be used provides: "The materials used shall conform to Federal, State and local ordinances and laws, and shall be acceptable to the rice milling industry." Plaintiff argues that Orkin in using Lindane violated the provisions of the contract and breached its implied warranty to use proper materials, and was guilty of violations of the Federal Food, Drug, & Cosmetic Act, in that (1) it violated 21 U.S.C. § 342(a) (2) since no amount of Lindane whatever was permitted on milled rice; and (2) it violated 21 U.S.C. § 342(a) (1) in that it contained a poisonous and deleterious substance "which may render" the rice injurious to health. Plaintiff further contends that the undisputed evidence also shows violations of the Pure Food laws of the State of Texas and violations of the City of Houston ordinances.

Our inquiry is limited to alleged violations of the contract in the use and application of Lindane and to determining whether there is any evidence supporting the

findings of the jury with respect thereto on either or both the contract and tort phases of the case. We are unable to say as a matter of law that Orkin breached its contract and implied warranty with respect to the infestation of the rice. In this respect we are in accord with the law of the case as determined by the Waco Court. But even if we were to hold that there were such breaches as a matter of law, we would still be unable to determine how much damage resulted therefrom in the absence of a jury finding, and no issues were submitted with respect to such damage, although there was some evidence that the rice would probably have been remilled because of the infestation regardless of the use of Lindane.

Plaintiff pleaded that the spraying of an insecticide or pesticide on plaintiff's rice, rendering it unfit for sale, was a violation of Sections 861-880 of the Houston City Ordinances of 1942. Section 868 of such Ordinances provides that for the purpose of Article IV, entitled "Pure Food & Drugs," an article shall be deemed adulterated (c) Food-(5) "If it contains any added poisons or other added deleterious ingredient which may render such article injurious to health * * *." Section 866 provides: "No person shall, within the City, manufacture for sale, have in his possession with intent to sell or exchange, any article of food or drugs which is adulterated or misbranded within the meaning of this article." Section 873 provides for prosecution and punishment for violations of the foregoing sections.

The record in this case reflects that Lindane is a poisonous or deleterious ingredient and that it was added to the rice by Orkin in blowing Lindane dust all over the rice in plaintiff's mill. It was not necessary to show that the

food containing an added poisonous or deleterious substance must affect the public health in order for it to be condemned. All that need be established is that the added poisonous or deleterious substance must be such as may render such article injurious to health. United States v. Lexington Mill & Elevator Co., 232 U.S. 399, 34 S.Ct. 337, 58 L.Ed. 658. There is substantial evidence showing that Lindane in any quantity on rice may render such article injurious to health. The jury's finding to Special Issue No. 2 finds support in the evidence. There is no assignment that any of the jury's findings are against the weight and preponderance of the evidence, and if there were such assignment, we could not consider it since defendant appeals from the court's refusal to grant an instructed verdict and judgment non obstante veredicto.

Plaintiff also pleaded that by spraying such rice and adulterating it and rendering it unfit for sale, Orkin violated Articles 4471 and 4472 of the Texas Revised Civil Statutes, and Articles 706, 707 and 717 of the Texas Penal Code. These provisions are substantially the same as those provided in the City of Houston ordinances. The violation of such statutes would subject plaintiff to criminal prosecution by the State, and to confiscation of the rice.

There is evidence in the record before us that Orkin applied Lindane to plaintiff's stores of rice, including both milled and unmilled rice. No claim for damages has been made by plaintiff for the unmilled rice, since it would necessarily have to be milled and milling would remove the Lindane.

The Waco Court on the record before it found in effect that there had been no violation of the Federal statutes relied upon by plaintiff. We think the record on this ap-

peal shows certain violations. Sec. 342 provides: "A food shall be deemed to be adulterated—(a) (1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health * * *; or (2) (A) if it bears or contains any added poisonous or added deleterious substance * * * which is unsafe within the meaning of section 346a * * *." The exceptions in Section 342(a) (2) (A) do not apply to milled rice and are inapplicable to the facts of this case. Section 346 with respect to tolerances for poisonous ingredients provides: "Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for the purposes of the application of clause (2) (A) of section 342(a) of this title." The evidence and the record before us show that Lindane was not required in the production of rice and that its use could have been avoided. Indeed, Lindane had been used only once in connection with plaintiff's mill from 1940 to 1955, and then it was used without the knowledge of the plaintiff or the health authorities. From the time of the application in August, 1955 Lindane has not been used down to the date of the second trial in 1961. Moreover, no allowance or tolerance was established for the use of Lindane on milled rice.

Plaintiff asserts that on the second trial the evidence shows that Lindane was on all the samples of rice that were taken and analyzed, except one sample that had been remilled. Even if plaintiff is mistaken in such assertion, there is nevertheless evidence showing that a number of samples were taken and that the results of many samplings showed from 0.2 to 3.6 parts per million of Lindane, and that the addition of such parts of Lindane to milled rice may

render it injurious to health. Manifestly it would be impossible to segregate from the stores of contaminated milled rice in question some unknown quantity of rice that might not have had Lindane on it in such quantities.

[1, 2] Since no tolerance for Lindane on milled rice as applicable to the facts of this case had been established by the Secretary of Health, Education & Welfare, the addition of any amount of Lindane to such milled rice was in violation of Section 342 (a) (2) of the Federal Food, Drug, & Cosmetic Act, and especially so if it may have rendered the rice injurious to health. The Act in question is quite specific, as stated by the Supreme Court of the United States in the recent case of Flemming v. Florida Citrus Exchange, 358 U.S. 153, 79 S.Ct. 160, 3 L.Ed.2d 188:

> "Here again, in our construction of this explicit Act, we must be sensitive to what Congress has written, and recall that 'It is for us to ascertain—neither to add nor subtract, neither to delete nor to distort.' 62 Cases of Jam v. United States, 340 U.S. 593, 596, 71 S.Ct. 515, 518, 95 L.Ed. 566."

Section 3.41, Title 21, 1955, Code of Federal Regulations, provides: "(a) The amendment in clause (2) of section 402(a) of the Federal Food, Drug, and Cosmetic Act shall become effective on the dates specified for the following pesticide chemicals: * * * (2) Effective date October 31, 1955: * * * Lindane: * * * Grain (from treating storage bins)." On the second trial it was established that plaintiff had never had any treating storage bins. The 1954 amendment to Section 342(a) (2) as provided in Section 5 of the Act of July 22, 1954 as applicable to the facts of the case before us, became effective one year following the date of the enactment of the Act or on July

22, 1955, and was in full force and effect in August, 1955, when the Lindane was applied to plaintiff's rice. Section 120.1(e), Title 21, 1955, Code of Federal Regulations, entitled "Definitions, Interpretations, and Exemptions," provides in substance that the term "Raw agricultural commodities" does not include foods that have been processed, fabricated, or manufactured by cooking, freezing, dehydrating, *or milling*. Since plaintiff's grain had been milled and was not a raw agricultural commodity, no tolerance had been established for it. Therefore, the application of any amount of Lindane was prohibited since it would add to the milled rice a poisonous or deleterious substance that may be injurious to health as shown by the evidence adduced on the second trial.

At the time of the occurrence in question, the Federal Food, Drug, and Cosmetic Act, Section 381(d), 21 U.S. C.A., provided with respect to exports that a food intended for export shall not be deemed to be adulterated or misbranded if it accords to the specifications of the foreign purchaser, is not in conflict with the laws of the country to which it is intended for export, and is labeled on the outside of the shipping package to show that it is intended for export. "But if such article is sold or offered for sale in domestic commerce, this subsection shall not exempt it from any of the provisions of this chapter." While there is some evidence that as much as 95% of plaintiff's rice had been exported during some prior years, the evidence does not show that the rice in question was labeled for export or that it would necessarily be exported. It was held subject to sale in domestic markets as well as foreign markets. Furthermore, the undisputed testimony of plaintiff's general manager Smith who negotiated contracts with foreign buyers, was to the effect that he could not have sold to any foreign purchasers any rice containing Lindane.

[3] Defendant contends, however, that plaintiff voluntarily remilled its rice, and that it was not forced to do so by the Federal, State or City authorities. We think this contention is without merit. Under the evidence adduced on the second trial, it appears that plaintiff was placed in such position by Orkin that it could not keep the rice in its possession, sell or exchange the same without being subject to criminal prosecution and punishment under Section 873 of the Ordinances of the City of Houston, and under Article 717, Texas Penal Code. Additionally, the rice could be condemned, confiscated, forfeited and destroyed under Article 4470, Texas Revised Civil Statutes. The evidence shows that the State agency was prepared to take action if plaintiff's rice was sold or offered for sale with Lindane on it. Also, the shipment of such rice in interstate commerce would have subjected plaintiff to penalties under Sections 333 and 334 of the Federal Act. Having placed the plaintiff in the situation where it could neither retain nor sell the rice in question without violating the Pure Food laws of the City, State and Federal governments, and subjecting itself to prosecution and penalties, the defendant is not in a position to urge that plaintiff acted voluntarily and not under coercion in remilling the rice and thereby preventing such prosecution and penalties, and at the same time mitigating the damages which might have resulted from confiscation and destruction of the rice by the State or other governmental authority.

[4] The cases cited by defendant with respect to voluntary payments are inapplicable to the factual situation in the present case. The retention or sale or offer to sell the rice in question constituted a violation of law, making plaintiff's action necessary to avoid prosecution, penalties and seizure of the rice. Under these circumstances plain-

tiff's act in remilling the rice was not voluntary but coerced as a matter of law. Where one risks prosecution, penalties and forfeiture of his property for noncompliance with law, his act in complying cannot be said to be voluntary. National Biscuit Co. v. State, 134 Tex. 293, 135 S.W.2d 687; Crow v. City of Corpus Christi, 146 Tex. 558, 209 S.W.2d 922; District of Columbia v. American Security & Trust Co., 292 U.S.App.D.C. 33, 202 F.2d 21; St. John's Electric Co. v. City of St. Augustine, Fla., 81 Fla. 588, 88 So. 387; 17-A Amer. Jur. Duress and Undue Influence §§7, 14, p. 875; 21 Tex.Jur. 2d Duress & Coercion §2, p. 116.

[5] Plaintiff on its appeal complains that the trial court erred in excluding certain evidence relative to lost profits and in denying its motion for lost profits before judgment. We have been unable to find in the record any request by plaintiff for submission of any issue on lost profits as such. The answer of the jury to Special Issue No. 7 awarding damages in the sum of $15,000,00 for the loss of use of plaintiff's mill consumed in remilling the milled rice, necessarily includes lost profits. No judgment for lost profits in any other amount could have been entered without plaintiff's compliance with Rule 301, Texas Rules of Civil Procedure. There was no such compliance.

[6] Plaintiff has cited a number of cases in support of the rule that where a business is already established and making a profit, it is permissible to show the amount of business done in corresponding periods of time not too remote, and the rule that uncertainty of proof as to the amount of lost profit will not defeat recovery so long as there is no uncertainty as to the fact of legal damages. These general rules are not questioned by defendant. In the instant case plaintiff's witness was asked to give oral testi-

mony from some records as to the amount of rice purchased by plaintiff in October, November and December of 1953, to which question defendant objected because there had been no showing of any comparison between conditions during such period of time and the period of time in issue in this law suit. The objection was sustained. Plaintiff's witness was also asked whether he had an opinion as to the amount of rice he would have bought, to which question the defendant objected as not being based upon facts. No other evidence along such line was offered, although in its bill of exception in the jury's absence such witness testified that he thought "it would be reasonable to suppose" that they would have bought at least 100,000 additional barrels and that he thought "it is reasonable to suppose we would have made at least 50 cents a barrel." We cannot say that the court improperly excluded such testimony, but if there was any error in such connection, we think the exclusion was not harmful in view of all the records and testimony relative to earnings and profits of the business that were admitted in evidence.

[7] In its sixth Point, plaintiff asserts that the court erred in denying interest before judgment upon its damages. Plaintiff sued not only for its damages but for interest thereon as damages. It states in its brief that it continued to sustain damages until June 7, 1956. It is our view that the plaintiff is entitled as a matter of law to 6% interest as damages on the $36,246.32 from that date until date of judgment, such interest amounting to $12,239.17. The Texas Co. v. The State of Texas, 154 Tex. 494, 281 S.W. 2d 83; Watkins v. Junker, 90 Tex. 584, 40 S.W. 11; Tortuguero Logging Operation, Ltd. v. Houston, Tex. Civ. App., 349 S.W.2d 315; Ewing v. Wm. L. Foley, Inc., 115 Tex. 222, 280 S.W. 499, 44 A.L.R. 627.

[8] We think there is no merit in plaintiff's contention that it was entitled to a directed verdict or in its contention that the court erred in granting a partial summary judgment for defendant in connection with plaintiff's claim for gross negligence and exemplary damages. A careful review of the record shows that there is no evidence that would warrant submission of an issue in connection with alleged gross negligence on the part of the defendant.

The judgment of the Trial Court is reformed by adding thereto interest to date of judgment in the sum of $12,239.17, and, as reformed is affirmed.

SUPREME COURT, U. S.
OCT 15 1963
JOHN F. DAVIS, CLERK

NO. 424

IN THE

Supreme Court of the United States

October Term, 1963

ORKIN EXTERMINATING COMPANY, INC.,
Petitioner

v.

GULF COAST RICE MILLS, *Respondent*

BRIEF IN REPLY TO MOTION TO DISMISS

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NO. 283

IN THE

Supreme Court of the United States

October Term, 1963

ORKIN EXTERMINATING COMPANY, INC.,
Petitioner

v.

GULF COAST RICE MILLS, *Respondent*

BRIEF IN REPLY TO MOTION TO DISMISS

I. The Federal questions, raised for the first time in Petitioner's Motion For Rehearing in the Appellate Court below, were timely presented under the exception to the general rule.

Petitioner relies wholly upon the exception to the general rule as to timeliness of raising the federal questions, as it is stated in *Herndon v. Georgia*, 55 S. Ct. 794, 295 U.S. 441, 79 L.Ed. 1530, rehearing denied 56 S. Ct. 82, 296 U.S. 661, 80 L. Ed. 471. The majority opinion there states that a federal claim is made timely "if the ruling of the

state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it." Mr. Justice Cardozo in his dissent indicates (at 295 U.S. 447, 79 L. Ed. 1535) that the exception applies "when a constitutional privilege or immunity has been *denied for the first time* by a ruling made upon appeal," because it is then that the complaining litigant can be expected to be "thus surprised."

In the case at bar, no unconstitutional deprivation of rights ever occurred for which Petitioner had cause to complain until the state appellate court issued its written opinion. No governmental agency had issued any order to Petitioner, no governmental intrusion had occurred as against Petitioner by any administrative action, and this lawsuit bore no resemblance to the usual suit in which a government seeks to enjoin compliance with its statutes. The mere pleadings of the Respondent, alleging an undesignated number of violations of some seventy-odd sections of the Federal Food & Drug Act and several sections of local food laws (by pleading inconsistently in the alternative), intermingled with an equal number of allegations having nothing to do with governmental regulations of any kind, did not deprive Petitioner of any constitutional right. The immunity herein claimed is immunity from local food laws which, *as later construed*, conflict with federal regulations in a federally pre-empted area; the privilege claimed is that of relying upon the sanctions of such federal law. No ruling or order had ever been issued in the trial court, or previously, which the Petitioner could have challenged under the Constitution. Petitioner's rights were "denied for the first time by a ruling made upon appeal."

This denial of rights could not reasonably have been anticipated. Two specific circumstances set this case apart from ordinary cases of governmental intrusion upon private rights, and caused Petitioner justifiably to anticipate (at worst) a ruling exactly opposite to that which is challenged by this appeal. First, the only violation of pesticide "tolerance" statutes found by the Houston appellate court was the violation of Section 346 as embodied in Section 342(a)(2) of the federal act, whereas the only violation of a pesticide "tolerance" statute *alleged* by Respondent was that of Section 346(*a*) as embodied in Section 342(a)(2) (*B*) of such Act; see Plaintiff's Third Amended Original Petition, subparagraphs 8 and 9 of paragraph III (Transcript Vol. I, pp. 2-4). Secondly, upon the first appeal of this case the Waco Court of Civil Appeals had explicitly ruled against respondent on this precise contention *as a matter of law*, upon the identical allegations of respondent, holding that there were no violations proven as alleged.

1. The ruling at issue was unanticipated because of the pleadings and evidence:

Respondent alleged in the most general terms, in subparagraphs 10-17, violations of "Sec. 301, et seq." of the federal act, in connection with five sections which prohibited the sale of this food.

Only two specific violations were alleged, these being in subparagraphs 7, 8 and 9 of Paragraph III of the petition. Subparagraph 7 alleged the "injurious to health" provision of the federal act. Subparagraphs 8 and 9 both alleged the "tolerance" provision of the federal act, Section 346a(*a*), and thereby it was urged in effect that the rice was a "raw" agricultural commodity adulterated by reason of the pres-

ence of a pesticide which was either prohibited or was present in amounts exceeding its tolerance.

The Waco court, on the first appeal, ruled that the rice was not a "raw" commodity and that these sections had no applicability to the case alleged, and that no violations were proven.

The second trial was had upon these identical pleadings. The respondent even persisted in introducing evidence to prove (contrary to the Waco court's legal opinion) that the rice was a "raw" commodity; the Director of the state food and drug department testified that the rice was a "raw" commodity and that he would have condemned and seized it because it had no tolerance allowed for Lindane (S.F. 298-299). These pleadings and evidence thereby confronted petitioner with only a single tolerance statute—the federal "raw agricultural commodity" section—which petitioner might have challegend hypothetically as being unconstitutional *if* it were to be construed by the trial and/or appellate court favorably to respondent's contentions. But even if such a federal question had been raised by petitioner's pleadings, or by objections to such evidence, it would now be utterly worthless and immaterial to this appeal because the ruling of the Houston appellate court was that such Section 346*a* was *not* violated but that an entirely different violation was proven, to wit: violation of Section 346—which had not even been alleged!

Clearly, *if* petitioner should have raised questions in the trial court as to the validity of any of the myriad of statutes alleged, it would have been a question only as to the applicability of the "raw" commodity provisions to the processed rice. It is inconceivable that the law placed upon Petitioner the burden of conjuring up every pos-

sible question as to the validity of every portion of every section alleged as "Sec. 301, et seq.". This would not be an "opportunity" to raise federal claims, but an endless and impossible burden of pleading and objecting.

2. The ruling at issue was not to be reasonably anticipated in view of the earlier opinion by the Waco court:

The Waco court had ruled that no violations of any kind had occurred under "the record before us." That record included the same essential facts that comprise the essence of the Houston court's ruling to the contrary, namely the fact that there was Lindane in the rice in quantities ranging "from *none* up to 3.6 parts of Lindane per million parts of rice."

Respondent argues that the record was "substantially" different in the second trial. Petitioner must concede that this was true in the respect that the *evidence* adduced differed enough that the Houston court was not bound by the doctrine of the "law of the case". But if only the *evidence* was different, while the Respondent chose to put Petitioner to trial upon the same *pleadings* as were used in the first trial, *when* was Petitioner expected to begin anticipating a different application of the food statutes? If the Waco court rulings could have been expected to afford any guidance at all, Petitioner surely was justified in going into the second trial without a thought of raising a federal question as to Respondent's *pleadings;* they were the same as those before the Waco court, and all contentions therein had been overruled as to "violations" upon which the tort case was based—the case had been remanded for re-trial only because "there were numerous disputed factual issues in the contract and breach of warranty phases of the case" (see Waco court opinion, page 47,

JURISDICTIONAL STATEMENT). In proceeding to trial, it would have been unthinkable to raise objections to each item of *evidence*, throughout the lengthy trial, in which virtually all evidence pertained in some way to the alleged violations of law.

The final rulings, now appealed from, were that the Lindane was prohibited because (1) it was not a "required" poison under Section 346 and (2) its presence in any amount may have rendered the rice injurious to health under Section 342(a)(1). It is utterly impossible to find in the record any ruling by the second trial court which could have been understood to be a ruling on either of these two points, especially in the face of the previous rulings of the Waco court. The only rulings made in the trial court would be comprised in whatever could reasonably have been understood to be "implied" in its jury charge. But can it now be said that the trial court "implied" a ruling in his charge to the effect that the evidence proved a violation of Section 346? This cannot be true unless the charge contained implied findings of violations of *every statute alleged* for which support could be found in the evidence, and particularly the "raw" commodity statute, Section 346a. The latter hypothesis is impossible because such statutes were alleged only in the alternative and inconsistently.

The verdict having come in upon the jury charge, and both the verdict and the charge in the second trial being substantially like those in the first, there still remained no fair "opportunity" to raise a specific federal question, because no conclusion of law or other legal ruling was handed down which would deny a constitutional right. As respondent correctly states in its Motion to Dismiss (at

page 19), the trial court had simply "found evidence supporting this verdict" by his submitting the issue to the jury and entering judgment thereon. The verdict was merely a finding that Petitioner had been *negligent*. This negligence may have been found upon the basis of a violation of any one of some *eighty* statutes—or violations of many of these, or of none at all. Obviously, Petitioner could not have known of what statutory violation, if any, it had been found guilty, and thus could not assert any particular federal immunity or privilege.

II. The Federal questions are substantial.

Statements having no support in the record are made by Respondent in this connection on pages 8-9 of its MOTION TO DISMISS, and should be disregarded. These statements are: (1) that the occurrence made the basis of this suit "was a single, isolated episode in 1955"; and (2) that the Petitioner "only once used the poison Lindane on milled rice and has not used it again since 1955."

The record only shows that Lindane has not been used *at the Gulf Coast Rice Mill* during such periods. As to whether it has been used elsewhere and is in general use *elsewhere*, is not found in testimony in the record.

That *all* chlorinated hydrocarbons, including all benzene hexachloride and *especially* Lindane, are in general use throughout the Nation is the only reasonable inference to be drawn from the fact that the Federal Food & Drug Administration has seen fit to list these pesticides, in Section 3.41 of Title 21, C.F.R., among the many chemicals which are sanctioned for use in "raw" agricultural commodities. Lindane is thus encouraged by the Administra-

tion to be extent that pursuant to Section 120.1(f) of Title 21, C.F.R., it may be so used even if its residue remains on such food after processing and "when ready to eat."

III. The judgment below does not rest upon an adequate non-Federal basis.

The judgment below is rested upon the basis that the use of Lindane violated state and city laws as well as federal statutes, as Respondent recognizes in pages 1-3 of its MOTION TO DISMISS. Further, Respondent is correct in asserting that the state and city laws formed independent bases for the judgment in the opinion of the court below, and such judgment would have been the same without regard to federal statutes.

This does not mean, however, that the judgment rests upon "adequate non-federal *grounds*," as Respondent argues, because federal questions as to the unconstitutionality of such local laws were raised by Petitioner. It is submitted that Respondent has misconceived the meaning of Rule 16 of this Honorable Court in assuming that "non-federal bases" means "non-federal" statutes.

It is precisely *because* the court below rested its decision upon such local statutes and ordinances which, as so construed, are unconstitutional, that Petitioner herein asserts its right of appeal.

IV. Petitioner challenges statements made by Respondent asserting that Petitioner's Insurance carrier is the only true party at interest herein.

The references on page 21 of the Motion to Dismiss are not only de hors the record, and irrelevant, but are

scandalous attempts improperly to influence this Honorable Court. Further, the truth thereof is specifically denied, and counsel for Petitioner insists that they are conscientiously representing solely the interests of the Petitioner exterminating company herein.

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By_____
John D. Richardson

PROOF OF SERVICE

I, John D. Richardson, one of the attorneys for Orkin Exterminating Company, Inc., Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of October, 1963, I served copies of the foregoing Reply Brief upon the following:

1. On Gulf Coast Rice Mills, Appellee, by depositing same in a United States mail box with first class postage prepaid, addressed to Carnes & Martin, counsel of record for such Appellee, at their last known post office address at Bank of the Southwest Building, Houston, Texas.

_____
John D. Richardson